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SERVING TWO MASTERS: MILITARY AIRCRAFT COMMANDER AUTHORITY AND THE STRATEGIC AIRLIFT CAPABILITY PARTNERSHIP'S MULTINATIONAL AIRLIFT FLEET

CHRISTOPHER M. PETRAS*

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ABSTRACT

This article explores the legal implications of having a military pilot from the armed forces of one nation serve as the aircraft commander on a foreign flagged state aircraft, focusing on the organizational structure of the multinational “Strategic Airlift Capability” (SAC) Consortium—a multinational partnership formed in 2006 to meet the strategic airlift requirements of its

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twelve participant nations. The article begins with an overview of the SAC Consortium, which is followed by an examination of the issue of the status of state aircraft under international law, as reflected in the 1944 Convention on International Civil Aviation, better known as the Chicago Convention. It then takes up the subject of the legal authority of the military aircraft commander and considers the sources of this authority, showing how the authority of the military aircraft commander under international law makes the position distinct from other command positions in multinational military settings. Next, the article looks at the legal status of military aircraft and military aircraft commander authority within the context of the SAC Consortium, highlighting how legal complexities in these areas could undermine the effectiveness of this new international arrangement for the collective operation of the partnership's three Boeing C-17 aircraft. The article then proposes an alternative structure for the SAC Consortium that could remedy the legal pitfalls of the current arrangement, before finally offering some concluding comments. The purposes of this piece are two-fold: (1) to show how both the legal status of state (military) aircraft and their function as sovereign instrumentalities serve to define the status and authority of the military aircraft commander under international law; and (2) to show how the prospect of commanding over a foreign flagged aircraft and, in particular, a foreign flagged "air mobility" aircraft like the C-17 is especially problematic in the case of the SAC Consortium, due to the vagaries of their aircraft's legal character and the potential for conflict between the aircraft commander's role as an officer in the armed forces of his or her sending state and their responsibilities as the de facto representative of the aircraft's "territorial sovereign."

I. INTRODUCTION

“OVER THE NEXT four years, [the U.S. Department of Defense (DoD)] plans to spend about \$12 billion to modernize and procure [airlift aircraft] and is currently studying how many [and what kind] it needs.”¹ In this equation, foreign military sales of the Boeing C-17 *Globemaster III*—whether to

¹ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-67, DEFENSE ACQUISITIONS: STRATEGIC AIRLIFT GAP HAS BEEN ADDRESSED, BUT TACTICAL AIRLIFT PLANS ARE EVOLVING AS KEY ISSUES HAVE NOT BEEN RESOLVED 1, 2 (2009), *available at* <http://www.gao.gov/products/GAO-10-67>.

states individually or as a collective—have been advanced as a means of potentially “reduc[ing] allied nations’ demand on U.S. strategic airlift platforms in future operations.”² At the same time, governments within Europe and elsewhere are endeavoring “to improve their strategic airlift capabilities,” whether it’s because they recognize the ability to rapidly move and sustain forces as critical to success in modern military engagements, or want to increase participation in future humanitarian or disaster relief missions, or both.³ And for many of these nations, pooling resources is seen as a cost-effective way to “address airlift capability shortfalls in [today’s] restrictive budgetary environment.”⁴

Against this backdrop, the approach of the Strategic Airlift Capability (SAC) partnership to shared use of strategic airlift is being touted as a model for the collective acquisition and management of these assets.⁵ The SAC partnership is a multinational consortium that was formed in 2006 to meet strategic airlift requirements of its twelve participant nations.⁶ The SAC’s operational arm, the Heavy Airlift Wing (HAW), is headquartered at Papa Airbase in Hungary and operates a fleet of three C-17s, flying missions on behalf of the SAC participants—including missions in support of the North Atlantic Treaty Organization (NATO), the European Union (EU), and the United Nations (UN).⁷

² See WILLIAM KNIGHT & CHRISTOPHER BOLKCOM, CONG. RESEARCH SERV., RL 34264 STRATEGIC AIRLIFT MODERNIZATION: ANALYSIS OF C-5 MODERNIZATION AND C-17 ACQUISITION ISSUES, U.S. CONGRESSIONAL RESEARCH SERVICE REPORT 34 (2007); see also Major James D. Hood, *NATO Strategic Airlift: Capability or Continued US Reliance?* 13 (2009), <http://handle.dtic.mil/100.2/ADA539589> (noting that “[d]ue to a lack of European strategic airlift capability, the United States supported 29 European nations with over 900 airlift missions transporting more than 20,000 short tons of cargo in 2007 alone”).

³ See Katia Vlachos-Dengler, *Carry That Weight: Improving European Strategic Airlift Capabilities*, PARDEE RAND GRADUATE SCHOOL 1–5 (2007), http://www.rand.org/pubs/rgs_dissertations/2007/RAND_RGSD219.pdf.

⁴ *Id.* at iii, 114–16; see also KNIGHT & BOLKCOM, *supra* note 2, at 35.

⁵ Press Release, NATO, Strategic Airlift Capability Moves to Implementation (Oct. 1, 2008), available at <http://www.nato.int/docu/pr/2008/p08-124e.html>.

⁶ See NATO, *Strategic Airlift Capability: A Key Capability for the Alliance*, http://www.nato.int/cps/en/natolive/topics_50105.htm (last updated Dec. 7, 2011). “The participants include ten NATO nations (Bulgaria, Estonia, Hungary, Lithuania, the Netherlands, Norway, Poland, Romania, Slovenia, and the United States) and two Partnership for Peace (PfP) nations (Finland and Sweden).” *Id.*

⁷ Press Release, U.S. Air Forces in Europe Public Affairs, Multinational Strategic Airlift Consortium Completes First Flight in Support of ISAF (Oct. 1, 2009),

Under the terms of the SAC implementing arrangement, participant nations are allocated a share of the HAW's estimated 3,100 yearly flying hours, and are, in turn, obligated to contribute military personnel to the unit in ratios commensurate with their proportionate investments in the program.⁸ But regardless of which SAC participant is the benefactor, HAW missions are flown by multinational crews, with pilots coming primarily from the Norwegian, Swedish, and U.S. armed forces.⁹ At the same time, in addition to being based in Papa, SAC aircraft are registered by, and bear the military ensign of, the Republic of Hungary.¹⁰ The HAW's organizational and command structure thus requires that the military officers piloting the unit's C-17s, in fact, operate and serve as aircraft commanders over what are ostensibly Hungarian "state aircraft" within the meaning of the Convention on International Civil Aviation of 1944, commonly referred to as the Chicago Convention.¹¹

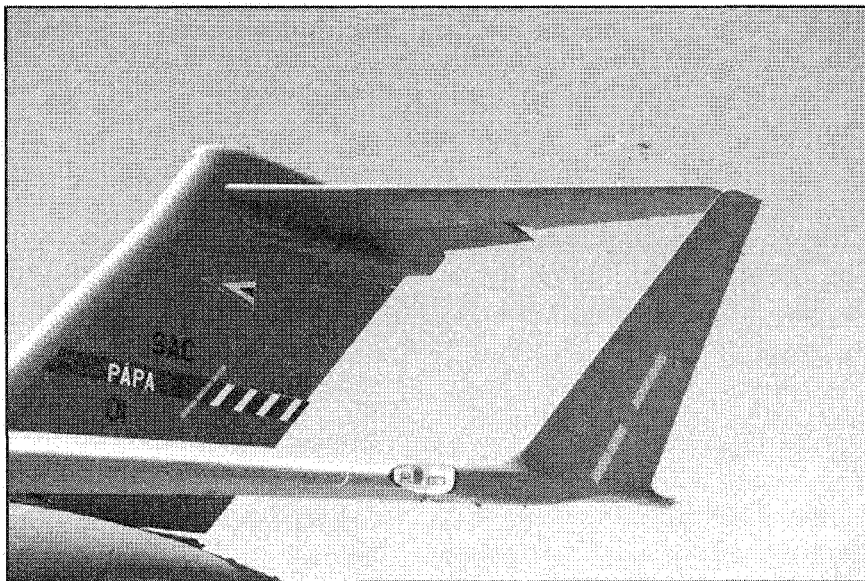
available at <http://www.eucom.mil/article/20132/multinational-strategic-airlift-consortium-flight>.

⁸ See Cristin Marposon, *12-Nation Heavy Airlift Wing Takes Flight with First C-17*, AIR FORCE PRINT NEWS TODAY (July 16, 2009), available at http://www.usafe.af.mil/news/story_print.asp?id=123158912.

⁹ *Id.*

¹⁰ See Marcus Weisgerber, *Team Airlift*, AIR FORCE, June 2009, at 38, 40. HAW aircraft are marked with the Hungarian Air Force's triangular roundels and a tail flash consisting of a blue strip across the vertical stabilizer bearing the name "Papa" and red, white, and green stripes (*i.e.*, the colors of the Hungarian flag) across the rudder. *Id.* at 40.

¹¹ See Memorandum of Understanding Concerning Strategic Airlift Capability (SAC), *opened for signature* Mar. 11, 2008, U.S. Dep't of State, Treaty Affairs doc. No. 129827 §§ 14.1, 19.1, available at <http://www.state.gov/documents/organization/129827.pdf> [hereinafter SAC MOU]; see also Convention on International Civil Aviation art. 3, Dec. 7, 1944, 61 Stat. 1180, 15 U.N.T.S. 295 [hereinafter Chicago Convention].



SAC C-17s are marked with the Hungarian Air Force's triangular roundel
(Photo: <http://www.usafe.af.mil>).

Of course, for many SAC participants (ten of whom are also NATO members), multinational operations are nothing new. The United States, for one, enjoys a centuries-long tradition of fighting alongside allied nations dating back to the American Revolution.¹² Thus, the United States has well-established guidelines for forces participating in multinational organizations with alliance or coalition members, which ensure national legal limitations on foreign command and control of American troops are taken into account whenever they operate under an integrated command structure.¹³ Consequently, "U.S. military forces can and have been subordinated to foreign control with

¹² See Christopher J. Makins, *Foreword* to MICHAEL A. CANNA, *COMMAND AND CONTROL OF MULTINATIONAL OPERATIONS INVOLVING U.S. MILITARY FORCES*, at vii (The Atlantic Council of the United States 2004), *available at* <http://www.isn.ethz.ch/isn/Digital-Library/Publications/Detail/?ots591=0C54E3B3-1E9C-BE1E-2C24-A6A8C7060233&lng=en&id=10616>.

¹³ See, e.g., Executive Summary: The Clinton Administration's Policy on Reforming Multilateral Peace Operations § V (U.S. Dep't of State 1994), *reprinted in* 33 I.L.M. 705 (1994), *available at* http://www.state.gov/www/issues/un_clinton_policy.html [hereinafter Exec. Summary]; Conrad K. Harper, Legal Adviser, U.S. Dep't of State Statement on the Legal Authority for UN Peace Operations (Mar. 3, 1994), *reprinted in* 33 I.L.M. 821, 829 (1994); Statement by the Press Secretary on Reforming Multilateral Peace Operations, 30 WEEKLY COMP. PRES. DOC. 998 (May 5, 1994); OFFICE OF THE CHAIRMAN OF THE JOINT CHIEFS OF STAFF, JOINT PUBLICATION 3-16: JOINT DOCTRINE FOR MULTINATIONAL OPERATIONS vii (2000).

little concern for the loss of national control this action may imply.”¹⁴

However, the experience of the United States and other SAC participant nations with multinational military operations notwithstanding, due to the special status of state aircraft under international law, the notion of a pilot from one nation’s armed services serving as aircraft commander on a foreign flagged state aircraft elicits legal concerns that go beyond the command-authority issues typically associated with combined military forces.¹⁵ Like warships, state aircraft that have received authorization to enter the territory of another state enjoy sovereign immunity from interference by the authorities of the foreign nation, including immunity from foreign search and inspection.¹⁶ In addition, as sovereign instrumentalities, state aircraft are, in effect, a territorial extension of the flag nation and activities on board the aircraft are thus under its exclusive jurisdiction.¹⁷ By international custom and practice, both the responsibility to enforce sovereign immunity and the authority to exercise jurisdiction of the flag nation inure to the aircraft

¹⁴ CANNA, *supra* note 12, at 34; *see generally id.* app. (listing “Examples of U.S. Military Forces Subordination to Foreign Military Control”); *see also* RUSSELL J. PARKINSON, FOREIGN COMMAND OF U.S. FORCES (DAMH-RAS Feb. 25, 1993), *available at* <http://www.dtic.mil/doctrine/doctrine/research/p176.pdf>.

¹⁵ *See generally* CANNA, *supra* note 12, at 3–8 (discussing the law and policy governing command and control of U.S. forces during multinational contingency operations).

¹⁶ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 457 n.7 (1987) [hereinafter RESTATEMENT 3D, FOREIGN RELATIONS LAW]; *see also* U.S. DEP’T OF DEFENSE, DEPARTMENT OF DEFENSE DIRECTIVE 4500.54E, DoD FOREIGN CLEARANCE PROGRAM (FCP) 2 (2009) [hereinafter DoDD 4500.54E]; U.S. DEP’T OF DEFENSE, DEPARTMENT OF DEFENSE MANUAL 4500.54, FOREIGN CLEARANCE MANUAL, ¶ C2.1.5 (2009) [hereinafter FOREIGN CLEARANCE MANUAL]; U.S. DEP’T OF THE NAVY, NAVAL WARFARE PUBLICATION 1-14M, THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS, ¶ 2.4.2 (2007) [hereinafter NAVAL WARFARE PUB. 1-14M]; U.S. AIR FORCE JUDGE ADVOCATE GENERAL’S DEP’T, AIR FORCE OPERATIONS & THE LAW 71 (2d ed. 2009) [hereinafter USAF Ops LAW HANDBOOK].

¹⁷ *Cf.* JOHN B. MOORE, A DIGEST OF INTERNATIONAL LAW AS EMBODIED IN DIPLOMATIC DISCUSSIONS, TREATIES AND OTHER INTERNATIONAL AGREEMENTS, INTERNATIONAL AWARDS, THE DECISIONS OF MUNICIPAL COURTS, AND THE WRITINGS OF JURISTS, AND ESPECIALLY IN DOCUMENTS, PUBLISHED AND UNPUBLISHED, ISSUED BY THE PRESIDENTS AND SECRETARIES OF STATE OF THE UNITED STATES, THE OPINIONS OF THE ATTORNEYS-GENERAL, AND THE DECISIONS OF COURTS, FEDERAL AND STATE 930–37 (1906) (discussing the jurisdictional status of warships) [hereinafter DIGEST OF INT’L LAW]; *see also* LOUIS HENKIN, INTERNATIONAL LAW: POLITICS AND VALUES 234 (1995).

commander.¹⁸ A military pilot commanding over a foreign flagged state aircraft must therefore simultaneously serve multiple interrelated but potentially conflicting roles—i.e., that of a member of the armed forces of the pilot's sending state and that of the *de facto* representative of the aircraft's "territorial sovereign."¹⁹

This is not to suggest that the concept of multinational aircraft operations is unique to the HAW. For example, the NATO Airborne Early Warning and Control Force (NAEW&CF) E-3A Component, established in 1982, is comprised of military personnel from fourteen member nations.²⁰ It operates seventeen Boeing E-3A Airborne Warning and Control System (AWACS) aircraft out of its Main Operating Base in Geilenkirchen, Germany.²¹ Like the SAC C-17s, the NATO AWACS aircraft are manned by multinational crews and piloted by officers from militaries other than that of the flag nation for the aircraft—i.e., the Grand Duchy of Luxembourg.²² Notably, however, NATO officials selected Luxembourg as flag nation for the AWACS mainly because "it had had no air force and therefore no existing national regulations covering military aircraft."²³ This made Luxembourg an accommodating choice that would presumably afford the E-3A Component commander greater "latitude and flexibility," particularly with respect to the composition of aircrews.²⁴ Hungary, in contrast, is a nation with an air force and a regulatory history respecting military aviation that dates back to the last days of the Austro-Hungarian Empire (c. 1917).²⁵ Thus, at least in theory, the HAW commander is denied the greater operational autonomy no doubt associated with

¹⁸ Cf. PHILIPP WENDEL, *STATE RESPONSIBILITY FOR INTERFERENCES WITH THE FREEDOM OF NAVIGATION IN PUBLIC INTERNATIONAL LAW* 164 n.542 (2007) (discussing the ship captain's jurisdictional authority); see also DoDD 4500.54E, *supra* note 16, at 2; FOREIGN CLEARANCE MANUAL, *supra* note 16, ¶ C2.2.5.

¹⁹ Cf. NICOLAS M. MATTE, *TREATISE ON AIR-AERONAUTICAL LAW* 293 (1981) (discussing factors that influence the status of the aircraft commander as a "delegate" of the state of registration).

²⁰ *Frequently Asked Questions*, NATO, <http://www.e3a.nato.int/eng/html/faq.htm> [hereinafter NATO E-3A COMPONENT FAQ] (last visited Nov. 15, 2011).

²¹ *Id.*

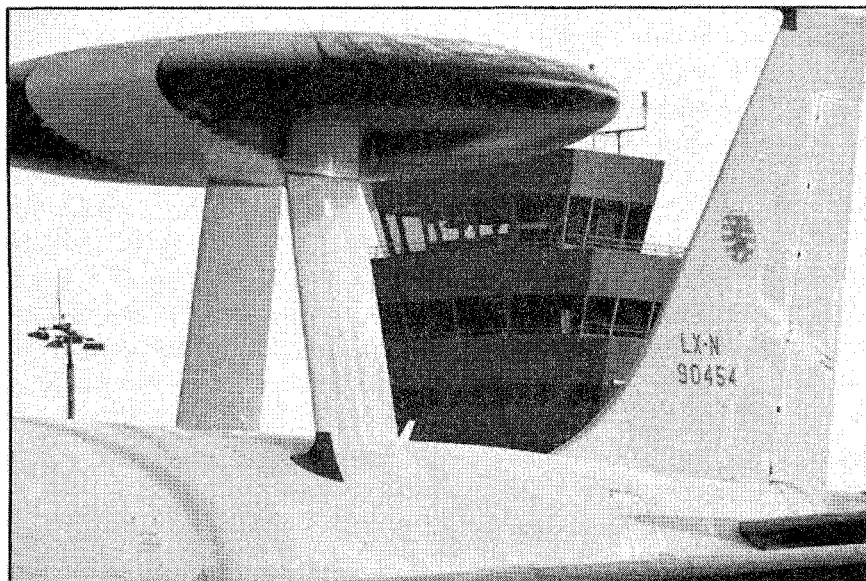
²² See *id.* NAEW&CF program participants include Belgium, Canada, Denmark, Germany, Hungary, Italy, Luxembourg, the Netherlands, Norway, Poland, Portugal, Spain, Turkey, the United Kingdom, and the United States. *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ See Directorate for Air Transport, NATIONAL TRANSPORT AUTHORITY, <http://old.nkh.gov.hu/en/aviation/content/view/4/25> (last visited Nov. 15, 2011).

a flag nation like Luxembourg, which, as the prospective flag nation for the NATO AWACS, was a veritable blank canvas with respect to the assertion of national competence over military aviation.



The lion on the tail of the NATO E-3A (AWACS) aircraft signifies that they fly under the flag of the Grand Duchy of Luxembourg
(Photo: <http://www.e3a.nato.int>).

Another potentially more legally significant distinction between the NATO AWACS and the SAC C-17s stems from the fact that the AWACS are jointly operated under the auspices of NATO—a collective defense organization established by treaty.²⁶ The AWACS thus not only provide airborne command and control, intelligence, surveillance, and reconnaissance (C2ISR) support to Alliance objectives,²⁷ but also participate in the international legal personality of NATO.²⁸ Conversely, the SAC C-17s, though “owned” by the NATO Airlift Management Or-

²⁶ North Atlantic Treaty art. 5, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243 (entered into force on Aug. 24, 1949), available at http://www.nato.int/cps/en/natolive/official_texts_17120.htm.

²⁷ See NATO E-3A COMPONENT FAQ, *supra* note 20; see also Vlachos-Dengler, *supra* note 3, at 31 (calling the NATO AWACS fleet “[a] characteristic example of a combination of acquisition pooling and pooled management”).

²⁸ See ALEXANDER SAMUEL MULLER, INTERNATIONAL ORGANIZATIONS AND THEIR HOST STATES: ASPECTS OF THEIR LEGAL RELATIONSHIP 81 n.32 (1995).

ganization (NAMO),²⁹ operate outside the Alliance's military command structure.³⁰ Plus, neither the SAC nor its operational unit, the HAW, has any legal personality under either international law or the domestic law of participant nations.³¹ Therefore, consistent with what amounts to a "time-share plan" in the form of the partnership's Memorandum of Understanding (MOU),³² each SAC participant is left to individually determine how best to use its flight hours, whether in furtherance of national requirements or in support of NATO, EU, UN, or other third-party interests.³³ Because of the vagueness of the international regime for determining the legal status of aircraft, which will be discussed later, this ad hoc utilization arrangement could, in practice, undermine the status of SAC aircraft *qua* state aircraft and, in turn, cast doubt on the legal authority of the aircraft commander.

Furthermore, the legal interests and concerns arising out of the privileges and immunities of state aircraft are particularly acute in the case of "air mobility aircraft"³⁴ (like the C-17), as compared to combat aircraft³⁵ (like the AWACS).³⁶ This is because combat aircraft generally "function as instrumentalities of

²⁹ SAC MOU, *supra* note 11, § 7.1. Established by the North Atlantic Council, NAMO is a NATO Procurement, Logistics or Services Organization (NPLSO) responsible for the "acquisition, management and logistic support, spare parts[,] and other sustainment activity of [SAC] C-17 aircraft and other [SAC program assets]." *Id.* § 4.1.2.

³⁰ *See id.* §§ 3.5, 5.3, 12.1, 20.1.

³¹ *Id.* § 19.1.2.

³² KNIGHT & BOLKCOM, *supra* note 2, at 35.

³³ SAC MOU, *supra* note 11, § 17.

³⁴ *See* JOINT CHIEFS OF STAFF, JOINT PUBLICATION 1-02: DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS 13 (2010) (as amended through Sept. 15, 2011) [hereinafter DoD DICTIONARY], available at http://www.dtic.mil/doctrine/new_pubs/jp1_02.pdf ("air mobility" is "[t]he rapid movement of personnel, materiel and forces to and from or within a theater by air. . . . [and] includes both airlift and air refueling."); JOINT CHIEFS OF STAFF, JOINT PUBLICATION 3-17: AIR MOBILITY OPERATIONS I-8 (2009) [hereinafter JOINT PUB. 3-17] ("Airlift forces conduct operations through the air to transport personnel and materiel in support of strategic, operational, and tactical objectives and to deliver these personnel and materiel via airland or airdrop methods.") (emphasis omitted).

³⁵ "Combat Air Forces" are "[a]ir forces that are directly engaged in combat operations. Examples include fighters; bombers; command and control; combat search and rescue; and intelligence, surveillance, and reconnaissance aircraft." U.S. DEP'T OF THE AIR FORCE, INSTR. 10-420: COMBAT AIR FORCES AVIATION SCHEDULING 21 (2010) [hereinafter AFI 10-420].

³⁶ *See* Christopher M. Petras, *The Law of Air Mobility—The International Legal Principles Behind the U.S. Mobility Air Forces' Mission*, 66 A.F. L. REV. 1, 4–6 (2010).

armed conflict and, in this role, exercise the combat rights of a belligerent (e.g., overflying territory of an opposing belligerent, attacking military targets, etc.).”³⁷ Air mobility aircraft, on the other hand, “operate across the full spectrum of [military and political] objectives.”³⁸ So, besides “providing wartime combat support and aeromedical evacuation, mobility air forces aircraft provide, *inter alia*, peacetime sustainment and aeromedical evacuation of U.S. forces worldwide, as well as support to civil authorities and humanitarian relief.”³⁹ Moreover, whereas combat aircraft mainly operate within a given theater of operations and are, therefore, generally more likely to take off and land at the same base, air mobility aircraft are used to transport passengers and cargo over intercontinental distances and, in so doing, “regularly utilize” far-flung “foreign military and/or civilian airports.”⁴⁰ The far-reaching, truly global character of air mobility aircraft operations, thus, not only makes air mobility aircraft “inimitably dependent upon the navigational rights and freedoms of overflight enshrined in international law,”⁴¹ but arguably also makes them more likely to be subjected to foreign jurisdictional claims or other infringements upon state aircraft sovereignty as compared to combat aircraft.

³⁷ *Id.* at 5 (citing Hague Rules Concerning the Control of Wireless Telegraphy in Time of War and Air Warfare, Feb. 17, 1923, arts. 13, 16, 22, available at <http://www.icrc.org/ihl.nsf/FULL/275?OpenDocument>, reprinted in THE LAWS OF ARMED CONFLICT: A COLLECTION OF CONVENTIONS, RESOLUTIONS AND OTHER DOCUMENTS 317 (Dietrich Schindler & Jiri Toman eds., 4th ed. 2004) [hereinafter Rules Concerning the Control of Wireless Telegraphy]); see Richard H. Wyman, *The First Rules of Air Warfare*, xxxv AIR UNIVERSITY REVIEW 94, 98–99 (Mar.–Apr. 1984) (discussing attempts at international regulation of aerial warfare during the early 1900s), available at <http://www.airpower.au.af.mil/airchronicles/aureview/1984/mar-apr/wyman.html>.

³⁸ Petras, *supra* note 36, at 5 (citing JOINT PUB. 3-17, *supra* note 34, at VI-1).

³⁹ *Id.* at 5 (citing U.S. DEP’T OF THE AIR FORCE, AIR FORCE DOCTRINE DOCUMENT 2-6: AIR MOBILITY OPERATIONS 2, 29, 87 (2006) [hereinafter AFDD 2-6], available at <http://www.fas.org/man/dod-101/usaf/docs/afdd/afdd2-6.pdf>); see also DoD Dictionary, *supra* note 34, at 5 (defining “aeromedical evacuation” as “[t]he movement of patients under medical supervision to and between medical treatment facilities by air transportation”).

⁴⁰ Petras, *supra* note 36, at 5–6.

⁴¹ *Id.* at 74.



The Boeing C-17 "Globemaster III" in flight

(Photo: <http://www.af.mil/shared/media/photokb/photos/030327-F-9528H-001.jpg>)

The balance of this article will examine the legal implications and potential operational impacts of having a military officer from the armed forces of one nation pilot and serve as aircraft commander over a foreign flagged state aircraft and, particularly, a mobility aircraft, as in the case of a multinational strategic airlift operation like the SAC. The starting point for this assessment is an understanding of the special international legal status of state aircraft. Thus, Part II of the article will look at the definition of state aircraft and the associated rights and privileges of state aircraft under international law. With this underpinning, Part III will detail the corresponding legal authorities and responsibilities of the military aircraft commander. Part IV will then discuss how both the legal status and function of state aircraft as sovereign instrumentalities levy special requirements on the aircraft commander, such that the SAC C-17 commander's role as *de facto* representative of the aircraft's "territorial sovereign" could, at times, be inconsistent with his role and responsibilities as an officer in the armed forces of his sending state. Finally, Part V of the article will propose another potential organizational structure for the SAC Consortium, which if adopted could serve to eliminate these legal and operational conflicts and their potential consequences for the participant nation concerned, be it the flag nation for the aircraft, the send-

ing state of the aircraft commander, or the benefactor of a particular mission.

II. THE STATUS OF STATE (MILITARY) AIRCRAFT UNDER INTERNATIONAL LAW

The 1944 Convention on International Civil Aviation (Chicago Convention or Convention or Treaty) entered into force on April 4, 1947 and today remains vital as the legal framework for international civil aviation, boasting a remarkable 191 state parties.⁴² Although the main focus of the Chicago Convention is obviously *civil* aviation, one of the Treaty's most notable accomplishments is the recognition and codification of the panoply of substantive public international air law principles, to include the longstanding legal distinction between civil and state aircraft.⁴³ Specifically, Article 3(a) provides that the Chicago Convention "shall be applicable only to civil aircraft, and shall not be applicable to state aircraft[.]" and, though the Treaty does not explicitly define the terms "civil aircraft" and "state aircraft," Article 3(b) stipulates that "[a]ircraft used in military, customs[,] and police services shall be deemed to be state aircraft."⁴⁴ Still, because the Chicago Convention does not straightforwardly declare aircraft used in military, customs, and police services to be state aircraft, there is considerable debate as to whether this enumeration is exhaustive, such that state aircraft other than military, customs, and police aircraft are deemed to be civil aircraft and therefore subject to the Treaty's provisions; or merely informative, such that there can be state aircraft other than those specified that are likewise exempted from the Treaty's provisions.⁴⁵ However, the predominant view

⁴² *Foundation of the International Civil Aviation Organization (ICAO)*, ICAO, <http://www.icao.int/icao/en/hist/history02.htm> (last visited Nov. 15, 2011). See <http://www.icao.int/cgi/statesDB4.pl?en> for an official list of state parties to the convention.

⁴³ PAUL S. DEMPSEY, *PUBLIC INTERNATIONAL AIR LAW* 43, 47–48 (2008); *see also* Petras, *supra* note 36, at 7–8.

⁴⁴ Chicago Convention, *supra* note 11, 61 Stat. at 1181.

⁴⁵ *See* Int'l Civil Aviation Org. [ICAO], *Secretariat Study on "Civil/State Aircraft"*, at 5, ICAO Doc. LC/29-WP/2-1 (Mar. 3, 1995) [hereinafter *Study on Civil/State Aircraft*] ("Currently, there are no clear generally accepted international rules, whether conventional or customary, as to what constitute state aircraft and what constitute civil aircraft in the field of air law."); *compare* MATTE, *supra* note 19, at 139 ("There is no definition of the term 'civil aircraft' and 'State aircraft' given in the Convention. However, art. [3(b)] stipulates that 'aircraft used in military, customs[,] and police services shall be deemed to be State aircraft.' This para-

is that types of state aircraft other than those specified in Article 3(b) are treated as “civil aircraft,” though only in regard to whether they fall within the scope of applicability of the Convention and not in any broader context.⁴⁶

Notably, as with state aircraft, there is, as well, no per se definition of military aircraft in international law.⁴⁷ It has been proposed that the Paris Convention of 1919 solidified “the concept of military aircraft as ‘instrumentalities of nations performing noncommercial sovereign functions’” as an international norm,⁴⁸

graph is to be regarded as exhaustive.”), with MICHAEL MILDE, INTERNATIONAL LAW AND ICAO 70 (2008).

[Article 3(b)] is not a definition but only a rebuttable presumption (*presumptio iuris*). Many other types of aircraft may be involved in activities of the State *iure imperii* (in the State function), such as coast guard, search and rescue, medical services, mapping or geological survey services, disaster relief, VIP and Government transport, etc.; consequently, the examples given in article 3(b) cannot be taken as all-comprehensive.

Cf. Civil-Military Interface Standing Committee, *Definition of State Aircraft*, THE EUROPEAN ORGANISATION FOR THE SAFETY OF AIR NAVIGATION (Dec. 7, 2001), http://www.eurocontrol.int/mil/public/standard_page/stateac.html (“[O]nly aircraft used in military, customs[,] and police services shall qualify as State Aircraft.”) (emphasis added); ISABELLA H. DIEDERIKS-VERSCHOOR, AN INTRODUCTION TO AIR LAW 43–44 (2006) (identifying seven distinguishable categories of state aircraft); see generally Michel Bourbonniere & Louis Haeck, *Military Aircraft and International Law: Chicago Opus 3*, 66 J. AIR L. & COM. 885, 896–912 (2001) (analyzing Article 3 of the Chicago Convention as it regards “the concept and function of military aircraft”); see also Petras, *supra* note 36, at 7–8.

⁴⁶ Study on Civil/State Aircraft, *supra* note 45, at 13 (“This interpretation has no bearing on matters such as sovereign immunities and privileges attaching to state aircraft (as used in the broader sense) or other issues not dealt with in the Chicago Convention.”); see also Andrew S. Williams, *The Interception of Civil Aircraft over the High Seas in the Global War on Terror*, 59 A.F. L. REV. 73, 106 (2007) (“The main drawback for states of having their aircraft subject to the Chicago Convention is that foreign officials would have the right to board and search their aircraft on landing and departure, and could demand to see the aircraft’s certificates and other documents required by the [treaty].”); see also Petras, *supra* note 36, at 7; cf. Chicago Convention, *supra* note 11, 61 Stat. at 1185 (“The appropriate authorities of each of the contracting States shall have the right, without unreasonable delay, to search aircraft of the other contracting States on landing or departure, and to inspect the certificates and other documents prescribed by this Convention.”).

⁴⁷ See Study on Civil/State Aircraft, *supra* note 45, at 6–8. For further discussion of this issue and its significance for air mobility forces, see Petras, *supra* note 36, at 16–21.

⁴⁸ Petras, *supra* note 36, at 17 (quoting Bourbonniere & Haeck, *supra* note 45, at 891 (emphasis added) and citing Convention Relating to the Regulation of Aerial Navigation, Oct. 13, 1919, art. 32, 11 L.N.T.S. 173, 195 [hereinafter Paris Convention], reprinted in “Chicago” Acts and Related Protocols, XXX-1 ANNALS AIR & SPACE L. 5 (2005)).

but this view is not universally shared. For example, in a 2001 legal memorandum, the DoD General Counsel assailed “the commercial versus noncommercial distinction as ‘too vague’ and ‘[jeopardizing] the sovereign immunity of military aircraft conducting international operations.’”⁴⁹ To this end, the definition of military aircraft endorsed by the DoD “parallels [that of] ‘warships’ in the 1982 Convention on the Law of the Sea.”⁵⁰ Based in international law, this emergent definition “classifies as military aircraft ‘all aircraft operated by commissioned units of the armed forces of a nation bearing the military markings of that nation, commanded by a member of the military forces, and manned by a crew subject to regular armed forces discipline.’”⁵¹ Under this approach, “military aircraft operating under the direction of the DoD are ‘Chicago-type’ state aircraft—with the attached sovereign immunity and other rights and privileges⁵²—regardless of” the purpose of a given flight “or whether the military service receives reimbursement” for it.⁵³

Yet the theoretical limitations of both of these definitions are readily apparent when applied to multinational alliance or consortium aircraft like the NATO AWACS and the SAC C-17s. For example, under the former standard, both units’ aircraft would appear to satisfy the criteria for military aircraft to the extent

⁴⁹ *Id.* (quoting Memorandum from Williams J. Haynes, Gen. Counsel of the Dep’t of Def., to Richard B. Cheney, President of the Senate, and J. Dennis Hastert, Speaker of the House of Representatives 7 (Jul. 11, 2001), available at <http://www.dod.mil/dodgc/olc/docs/July12-Second.pdf> [hereinafter DOD/GC Memo]).

⁵⁰ *Id.* (citing United Nations Convention on the Law of the Sea art. 29, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS]).

⁵¹ *Id.* (quoting DOD/GC Memo, *supra* note 49, at 8 and citing NAVAL WARFARE PUB. 1-14M, *supra* note 16, ¶ 2.4.1; USAF OPS LAW HANDBOOK, *supra* note 16, at 6; LESLIE C. GREEN, THE CONTEMPORARY LAW OF ARMED CONFLICT 174 (2008)); MILDE, *supra* note 45, at 72; see also Williams, *supra* note 46, at 111 (noting that this same definition appears in the U.K. Ministry of Defence’s *Manual of the Law of Armed Conflict* (2004) and in the *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, published by the International Institute of Humanitarian Law in 1994, which he calls “the most contemporary and comprehensive restatement of the law of warfare at sea”).

⁵² Petras, *supra* note 36, at 18 (citing Bourbonniere & Haeck, *supra* note 45, at 901–03).

⁵³ *Id.* (citing DOD/GC Memo, *supra* note 49). Compare PETER P.C. HAANAPPEL, THE LAW AND POLICY OF AIR SPACE AND OUTER SPACE: A COMPARATIVE APPROACH 44 (2003) (“[F]ighter planes: even if they are used for training or demonstration services (air shows), they are military aircraft.”), with MILDE, *supra* note 45, at 71 (giving an example that “an unarmed fighter plane F-18 piloted by a military officer cleared under a civil flight plan for a flight to another country’s civil airport to deliver a rare serum for a critically ill person . . . could claim civil status”).

that they function as state aircraft of their particular flag nations (Luxembourg and Hungary) and their primary missions—i.e., airborne command and control and transport of troops and their supplies, respectively—are characteristically military. On the other hand, because SAC participants may utilize their flying hours in support of non-participants,⁵⁴ the status of a SAC aircraft could be called into question if, for instance, a third party on behalf of whom a particular HAW mission was flown were to reimburse a participant nation for use of all or part of its allocated share of flying hours.⁵⁵ Likewise, under the latter definition, the status of both the NATO AWACS and the SAC C-17s as military aircraft is technically questionable insofar as neither may actually be operated by the armed forces of the nation whose military markings are displayed on the aircraft.

Faced with this sort of uncertainty, the International Civil Aviation Organization (ICAO) Secretariat has long called for the ICAO Council⁵⁶ to consider resolving the state versus civil aircraft dilemma by adopting an interpretation of Article 3(b) similar to the 1952 “Definition of Scheduled International Air Service.”⁵⁷ As with the term “state aircraft,” the Chicago Convention assigns certain overflight rights to “scheduled air services” and “nonscheduled flight,”⁵⁸ respectively, but does not explicitly define either term; “rather, ‘nonscheduled flight’ is only negatively described as not being scheduled air transporta-

⁵⁴ SAC MOU, *supra* note 11, § 17.3.

⁵⁵ See *Study on Civil/State Aircraft*, *supra* note 45, at 11 (“Doubts regarding the status of aircraft under Article [3(b)] of the convention most often arise [when] . . . [a]ircraft [that] would otherwise be considered state aircraft (perhaps even with a military crew) [are] . . . used to carry passengers, mail[,] and cargo for remuneration or hire.”); see also DOD/GC Memo, *supra* note 49, at 7–8.

⁵⁶ “The Council is the 36-member governing body of ICAO, chosen by the representatives of all member nations that make up the ICAO Assembly.” Petras, *supra* note 36, at n.62 (citing ICAO, HOW IT WORKS, available at <http://www.icao.int/icao/en/howworks.htm>).

⁵⁷ *Study on Civil/State Aircraft*, *supra* note 45, at 16; see also ICAO, *Definition of Scheduled International Air Service*, ICAO Doc. 7278-C/841 (1952) (adopted pursuant to ICAO Assembly Resolution A2-18); Chicago Convention, *supra* note 11, 61 Stat. 1181–82 (defining traffic rights for “scheduled international air service” and “aircraft not engaged in scheduled international air service” (i.e., “nonscheduled flight”)); MATTE, *supra* note 19, at 151 n.98, 162 (noting that the Council defined “scheduled international air service” by spelling out its constituent elements, so that if any one element were not met, the service would be classified as “nonscheduled”). For further discussion of the adoption of the 1952 “Definition of Scheduled International Air Service,” see Petras, *supra* note 36, at 14–15.

⁵⁸ Chicago Convention, *supra* note 11, 61 Stat. at 1181–82.

tion, which again is also undefined.”⁵⁹ So, in 1952, the ICAO Council proposed a definition that reduced “scheduled services” to its constituent elements and “‘thereby delimit[ed] nonscheduled services in a negative manner’—in other words, if any one element of ‘scheduled international air service’ [were] not met, the service [would be] classified as ‘nonscheduled.’”⁶⁰ By comparison, the Secretariat’s proposal for determining whether an aircraft is a “Chicago-type” state aircraft—i.e., an aircraft “used” in military, customs, or police services—employs a “totality of the circumstances” approach, whereby a variety of factors would be taken into account and the weight given to any one factor or set of factors would vary based on the facts surrounding a particular flight.⁶¹ Factors to be considered would include:

- (1) ownership of the aircraft;
- (2) aircraft registration and markings;
- (3) the operator of the aircraft;
- (4) the nature of the operation (i.e., degree of military, custom, or police service control);
- (5) make-up of the aircrew;
- (6) secrecy or open nature of the flight;
- (7) the type of passengers and/or cargo on board;
- (8) the area of operations;
- (9) whether there are customs clearances for the flight; and/or
- (10) whether the aircraft is carrying documents required by the Chicago Convention and its Annexes.⁶²

Such an approach may represent an improvement over the currently prevailing ambiguity, but inasmuch as it seemingly still allows an aircraft that is for all intents and purposes “military”—e.g., in terms of its design, operator, markings, crew make-up, etc.—to be classified as “civil” based on the particulars of a given flight, it is unlikely to engender consensus among state parties

⁵⁹ Petras, *supra* note 36, at 14 (citing Chicago Convention, *supra* note 11, 61 Stat. at 1181 (defining “nonscheduled flight” as “aircraft not engaged in scheduled air services”); *cf.* Chicago Convention, *supra* note 11, 61 Stat. at 1206 (noting that Article 92 defines “air services” as “any scheduled air service performed by aircraft for the public transport of passengers, mail[,] and cargo,” and “international air services” as “an air service [that] passes through the airspace over the territory of more than one State”); MATTE, *supra* note 19, at 148–66 (discussing Article 5 of the Chicago Convention and the distinction between scheduled and nonscheduled services)).

⁶⁰ *Id.* (quoting MATTE, *supra* note 19, at 151 n.98, 162). *But see* MILDE, *supra* note 45, at 101 (noting that “[t]his definition is just an interpretation . . . and need not be taken as rigid or definitive”).

⁶¹ *See Study on Civil/State Aircraft*, *supra* note 45, at 14.

⁶² *Id.*

regarding how state/military aircraft should be defined in international law.⁶³ Still, the uncertainty surrounding the legal definitions of state and military aircraft notwithstanding, the classification of aircraft as “civil” or “state” remains significant, not only because it controls the applicability of the Chicago Convention and the ICAO regulatory regime embodied in the Treaty’s Annexes,⁶⁴ but also in terms of its impact on overflight rights.⁶⁵

Article 5 of the Chicago Convention grants civil aircraft flying “‘non-scheduled flights’ (e.g., charter flights) . . . the first two of the so-called ‘five freedoms’ of the air: (1) the freedom to fly into or across the territory of another state (transit), and (2) the freedom to make stops for non-traffic purposes, such as refueling or maintenance (technical stops).”⁶⁶ “A ‘side’ agreement”

⁶³ See MILDE, *supra* note 45, at 72; cf. DIEDERIKS-VERSCHOOR, *supra* note 45, at 41 (advocating for adoption of the definition of military aircraft proposed by de Vlucht whereby “military aircraft are aircraft forming part of, or—by virtue of registration in a military aviation register—destined to form part of, the armed forces”).

⁶⁴ The Chicago Convention established the International Civil Aviation Organization (ICAO)—a U.N. Specialized Agency responsible for ensuring “safe, regular, efficient[,] and economical air transport.” Chicago Convention, *supra* note 11, 61 Stat. at 1193, 1197. Through the “ICAO’s quasi-legislative authority,” it has adopted eighteen annexes to the treaty, “each of which contains [Standards and Recommended Practices (SARPs)] on a specific substantive area.” Petras, *supra* note 36, at 60 (citing DEMPSEY, *supra* note 43, at 51–53 (listing the Chicago Convention Annexes)). State aircraft are not subject to ICAO rules, but pursuant to Article 3(d) of the treaty must at all times operate with due regard for the safety of navigation. See Chicago Convention, *supra* note 11, 61 Stat. at 1181 (“The contracting States undertake, when issuing regulations for their state aircraft, that they will have due regard for the safety of navigation of civil aircraft.”); see also RESTATEMENT 3D, FOREIGN RELATIONS LAW, *supra* note 16, § 514 cmt. d.

⁶⁵ “Paradoxically, although the Chicago Convention purports not to be applicable to State aircraft, in fact, several provisions specifically apply to State aircraft.” DEMPSEY, *supra* note 43, at 48; see also Petras, *supra* note 36, at 7–8.

⁶⁶ Petras, *supra* note 36, at 11 (citing Chicago Convention, *supra* note 11, 61 Stat. at 1181).

The “Five Freedoms of the Air” were spelled out in the International Air Transport Agreement . . . as follows:

(1) The privilege to fly across territory without landing; (2) The privilege to land for non-traffic purposes; (3) The privilege to put down passengers, mail and cargo taken on in the territory of the State whose nationality the aircraft possesses; (4) The privilege to take on passengers, mail and cargo destined for the territory of the State whose nationality the aircraft possesses; (5) The privilege to take on passengers, mail and cargo destined for the territory of any other contracting State and the privilege to put down passengers, mail and cargo coming from any such territory.

to the Treaty, known as the International Air Services Transit Agreement (Two Freedoms Agreement), grants these “same basic traffic rights” to civil aircraft on scheduled flights as well.⁶⁷ Otherwise, air-traffic rights for civil aircraft are typically exchanged between states on a reciprocal basis in accordance with Article 6 of the Convention through bilateral treaties known as “air transport” or “air services” agreements.⁶⁸

Conversely, Article 3(c) of the Convention forbids state aircraft (including military aircraft) from “overflying or landing in” the territory of another state unless pursuant to, and in conformance with, the terms of a “special authorization from the over-flown [s]tate (e.g., [a] diplomatic clearance).”⁶⁹ Requests for overflight permission for state aircraft are generally consid-

Id. at n.46 (citing International Air Transport Agreement art. 1, § 1, Dec. 7, 1944, 59 Stat. 1701, 171 U.N.T.S. 387 [hereinafter Transport Agreement] and DEMPSEY, *supra* note 43, at 18–31 (discussing the “five freedoms” of the air that the U.S. delegation advanced at the 1944 Chicago Conference, as well as other freedoms of the air that have since been identified)); *see also id.* at 10–14 (discussing the Chicago Convention’s “three-tiered regime” for the exchange of over-flight (or air traffic) rights).

⁶⁷ *Id.* at 12 (citing DEMPSEY, *supra* note 43, at 29). “Under Article 1, Section 1, of the Transit Agreement ‘[e]ach contracting State grants to the other contracting States the following freedoms of the air in respect of scheduled international air services: (1) The privilege to fly across its territory without landing; (2) The privilege to land for non-traffic purposes.’” *Id.* at n.52 (quoting International Air Services Transit Agreement art. 1, § 1, Dec. 7, 1944, 59 Stat. 1693, 84 U.N.T.S. 389 [hereinafter Transit Agreement]). “The Transport Agreement, . . . which was also concluded at the Chicago Convention, provided for a multilateral exchange of all five freedoms of the air for international air services. As Professor Dempsey notes, however, ‘in the ensuing half century, fewer than a dozen nations ratified this agreement, and even the United States—its principal proponent—withdrawed after ratification.’” *Id.* (quoting DEMPSEY, *supra* note 43, at 29).

⁶⁸ *See id.* at 13–14; *see also* MILDE, *supra* note 45, at 107–13 (discussing bilateral air services agreements).

⁶⁹ Petras, *supra* note 36, at 10–11 (citing Chicago Convention, *supra* note 11, 61 Stat. at 1181); *see also, e.g.*, FOREIGN CLEARANCE MANUAL, *supra* note 16, ¶ DL.1.3 (2009) (defining “aircraft diplomatic clearance”):

Permission by a foreign government for a United States aircraft to overfly or land in its territory. An aircraft diplomatic clearance permits the movement into or through the territory of a foreign country of military aircraft, cargo, equipment, and aircrew members performing aircrew duties only, including the related activities necessarily involved in such entry or transit, subject to whatever restrictions the clearance specifies. Acceptance of a flight plan and the issuance of a flight clearance by a foreign air traffic control (ATC) unit does not constitute official approval to enter the airspace of any country that requires either prior permission or aircraft diplomatic clearance.

ered on a case-by-case basis,⁷⁰ “and usually require[e] ‘a statement of the flight’s purpose, route and final destination, and the aircraft used.’”⁷¹ State aircraft that fail to conform or act in accordance with the terms of the special permission granted by the over-flown state “may . . . be denied access to or directed to immediately leave the [s]tate’s territory and/or national airspace.”⁷²

In addition, any unauthorized intrusion into national airspace by a foreign aircraft is a violation of both customary sovereignty and the Chicago Convention.⁷³ Historically, the affected state would “have the legal right to respond” to such incursions “by intercepting the offending aircraft and turning it away; forcing it to land at a designated airfield; impounding the aircraft if it lands; or even shooting it down.”⁷⁴ However, in the aftermath of “the 1983 downing of Korean Air Lines Flight 007 by Soviet fighter aircraft, the ICAO Assembly⁷⁵ amended the Chicago Convention, adding Article 3 *bis*,”⁷⁶ which codified the custom-

⁷⁰ Cf. Petras, *supra* note 36, at 70 n.410 (citing FOREIGN CLEARANCE MANUAL, *supra* note 16, ¶ DL1.6 (defining “blanket clearance” as a “prearranged clearance for special categories of flights or personnel travel, usually granted on a periodic basis for a specified purpose and/or period of time”)).

⁷¹ “However, because [s]tates enjoy complete and exclusive sovereignty over their airspace, overflight permission may, for example, be further conditioned upon compliance with aircraft ‘disinsection’ and quarantine requirements, providing passenger lists or cargo information, or other stipulations.” Petras, *supra* note 36, at 70 (citing *Secretary General’s Report under Article 52 ECHR on the Question of Secret Detention and Transport of Detainees Suspected of Terrorist Acts, Notably by or at the Instigation of Foreign Agencies*, Council of Europe, ¶ 45, Doc. SG/Inf(2006)6 (2006) (“States applying for overflight permissions are not systematically requested to provide passenger lists or information about cargo, even though this would be possible.”); AUSTL. QUARANTINE & INSPECTION SERV. (AQIS), AQIS ARRANGEMENTS FOR AIRCRAFT INVOKING SOVEREIGN IMMUNITY (2008) (discussing “disinsection” requirements, or treatment to destroy insects), available at <http://daff.gov.au/aqis/avm/aircraft/sovereign-immunity>).

⁷² Petras, *supra* note 36, at 70–71 (citing Chicago Convention, *supra* note 11, 61 Stat. at 1181; NAVAL WARFARE PUB. 1-14M, *supra* note 16, ¶ 2.4.2).

⁷³ MATTE, *supra* note 19, at 175.

⁷⁴ Petras, *supra* note 36, at 21 (citing BOLESŁAW A. BOCZEK, INTERNATIONAL LAW: A DICTIONARY 203 (2005) (discussing states’ responses to airspace incursions by foreign aircraft); Bourbonniere & Haeck, *supra* note 45, at 946; CATHAL J. NOLAN, 2 GREENWOOD ENCYCLOPEDIA OF INTERNATIONAL RELATIONS: F-L 814 (2002)).

⁷⁵ *Id.* “The Assembly, composed of representatives from all Contracting States, is the sovereign body of ICAO. It meets every three years, reviewing in detail the work of the Organization and setting policy for the coming years. It also votes a triennial budget.” *Id.* at n.108 (quoting ICAO, HOW IT WORKS, *supra* note 56).

⁷⁶ *Id.* at 21–22. “Under Article 94(b) of the Convention, the amendment came into force on 1 October 1998 in respect of those States [that] have ratified it.” *Id.*

any international law principle that states “‘must refrain from resorting to weapons against *civil* aircraft in flight’ or, in the case of interception, endangering the safety of the aircraft and those on board.”⁷⁷ Nevertheless, because trespassing *military* aircraft present an obvious security threat “to the territorial sovereign, international legal standards for [s]tate responses to aerial intrusions” differentiate between civil and military aircraft by “imposing a much lower threshold for the use of force without warning against military aircraft that intrude into the territory of another [s]tate.”⁷⁸

Perhaps even more important for present purposes, dating back to the Paris Convention of 1919, aircraft classified as military aircraft have been regarded as sovereign instrumentalities with “the same status under international law as warships.”⁷⁹ In other words, military aircraft enjoy customary immunity “‘from the jurisdiction of other [s]tates, *even* when they are in the territory of those other [s]tates.’”⁸⁰

In practice, this means that the flag nation for the aircraft “exercises exclusive control over all” passengers, crew members, and activities on board, and both the aircraft and its crew are not only “immune from arrest or seizure” by the foreign state,

at n.109 (quoting Maria Buzdugan, “Chicago” Acts and Related Protocols, XXX-1 ANNALS OF AIR & SPACE LAW 20 n.1 (2005)).

⁷⁷ *Id.* at 22 (quoting Buzdugan, *supra* note 76, at 20 n.1 (emphasis added) and citing BOCZEK, *supra* note 78, at 204; Marco Gestri, *The Chicago Convention and Civilian Aircraft in Time of War, in THE LAW OF AIR WARFARE: CONTEMPORARY ISSUES* 129, 143–49 (Natalino Ronzitti & Gabriella Venturini eds., 2006) (discussing status of civilian aircraft in time of armed conflict)).

⁷⁸ *Id.* at 22 (citing John T. Phelps, *Aerial Intrusions by Civil and Military Aircraft in Time of Peace*, 107 MIL. L. REV. 255, 291–94 (1985); Bourbonniere & Haeck, *supra* note 45, at 946; BOCZEK, *supra* note 74, at 204).

⁷⁹ *Id.* at 69 (citing Paris Convention, *supra* note 48, 11 L.N.T.S. at 195); *see also supra* note 16 and accompanying text.

⁸⁰ Petras, *supra* note 36, at 68–69 (quoting Williams, *supra* note 46, at 104 (emphasis added)); J. ASHLEY ROACH & ROBERT W. SMITH, UNITED STATES RESPONSES TO EXCESSIVE MARITIME CLAIMS 163, 466–67 (2d ed. 1996) (citing RESTATEMENT 3D, FOREIGN RELATIONS LAW, *supra* note 16) (traditionally, the sovereign immunity of military aircraft imparts customary immunity from “the exercise of enforcement jurisdiction”—i.e., “immunity from arrest, attachment, or execution in the territory of any foreign State”); *see also* FOREIGN CLEARANCE MANUAL, *supra* note 16, ¶ C2.1.5; NAVAL WARFARE PUB. 1-14M, *supra* note 16, ¶ 2.4.2; Annotated Supplement to The Commander’s Handbook on the Law of Naval Operations, 73 NAVAL WAR COLLEGE INTERNATIONAL LAW STUDIES 110, 114–15 (A.R. Thomas & James C. Duncan eds., 1999); *cf.* Schooner Exch. v. McFaddon, 11 U.S. 116, 144 (1812) (holding that a public vessel of war of a sovereign is exempt from the jurisdiction of a foreign country); *supra* note 17 and accompanying text.

but also “exempt from [foreign] taxes and regulation.”⁸¹ Therefore, absent an “agreement between the [s]tates concerned to the contrary, military aircraft are exempt from [air navigation, overflight, or similar] fees for transit through” the national airspace of another state or through “FIRs in international airspace, as well as landing, parking, and other use fees assessed at government airports” and military installations.⁸² Moreover, the exclusivity of the flag nation’s jurisdiction further means that foreign officials may neither board the “aircraft without the aircraft commander’s consent,”⁸³ nor require the aircraft commander “to consent to an onboard search or inspection, including customs, safety, and agricultural inspections.”⁸⁴

Though the Chicago Convention does not expressly recognize the sovereign immunity of military aircraft, “sovereign immunity is not typically set forth in positive rules of international law, but instead is oftentimes expressed by exempting public vessels from the terms of a particular treaty.”⁸⁵ Indeed, the Chicago Convention is a true case in point. Under Article 3 of the Treaty, “state aircraft are excluded from the legal framework for civil aviation, whereby civil aircraft are not only [made] subject to the jurisdiction or control of foreign air traffic control authorities when operating in international airspace, but also subject to search and inspection while within” the territory of a foreign state.⁸⁶ Thus, as renowned American jurist, scholar, and air law pioneer, John Cobb Cooper, noted:

It is felt that the rule stated in the Paris Convention that aircraft engaged in military services should, in the absence of stipulation to the contrary, be given the privileges of foreign warships when in national port is sound and may be considered as still part of

⁸¹ Petras, *supra* note 36, at 70 (citing NAVAL WARFARE PUB. 1-14M, *supra* note 16, ¶ 2.2.2; DoDD 4500.54E, *supra* note 16, at 2).

⁸² *Id.* (citing DoDD 4500.54E, *supra* note 16, at 2; MILDE, *supra* note 45, at 72).

⁸³ *Id.* at 69 (citing NAVAL WARFARE PUB. 1-14M, *supra* note 16, ¶ 2.4.2); *see also* GEORGE GALDORISI & KEVIN R. VIENNA, BEYOND THE LAW OF THE SEA: NEW DIRECTIONS FOR U.S. OCEANS POLICY 101 (1997).

⁸⁴ Petras, *supra* note 36, at 69–70 (citing NAVAL WARFARE PUB. 1-14M, *supra* note 16, ¶¶ 2.2.2, 2.4.2; DoDD 4500.54E, *supra* note 16, at 2).

⁸⁵ Petras, *supra* note 36, at 69 (citing ROACH & SMITH, *supra* note 80, at 466–67; MILDE, *supra* note 45, at 61, 65–66); *see also* DIEDERIKS-VERSCHOOR, *supra* note 45, at 43–44 (listing international agreements containing references to state aircraft).

⁸⁶ Petras, *supra* note 36, at 69 (citing Chicago Convention, *supra* note 11, 61 Stat. at 1183, 1185).

international air law even though not restated in the Chicago Convention.⁸⁷

The ICAO Secretariat has cautioned that the lack of clear rules on what constitutes a state aircraft could lead to an aircraft, which is "operating on the assumption that it is a civil aircraft entitled to exercise" overflight and technical stop privileges under Article 5 of the Chicago Convention, being deemed an unauthorized state aircraft by the overflown state, thereby needlessly exposing the aircraft and its unsuspecting crew (and, potentially, passengers as well) to the danger of possible interception or even the use of force.⁸⁸ But aside from the resulting uncertainty over the applicability of certain air law instruments, the significance of a state aircraft being classified as a civil aircraft (mistakenly or otherwise) is generally perceived as theoretical.⁸⁹ However, for the state/military aircraft commander, the matter of the legal status of the aircraft as civil or state goes beyond the issue of whether the aircraft and/or its operation is subject to international legal regulations promoting "the safety, regularity[,] and economy of air navigation."⁹⁰ As one commentator has aptly noted, "military aircraft represent[] the sovereignty and independence of [the flag nation] more clearly than any other kind of aircraft."⁹¹ Consequently, "universally accepted rules of international law" extend to military aircraft the same sovereign immunity enjoyed by warships, such that, it is submitted, the authority of the military aircraft commander mirrors the customary authority of the commander of a warship.⁹² The legal classification of an aircraft as "military" is

⁸⁷ Williams, *supra* note 46, at 105 (quoting John Cobb Cooper, *A Study on the Legal Status of Aircraft*, in *EXPLORATIONS IN AEROSPACE LAW* 205, 243 (Ivan A. Vlasic ed., 1968)); *see also* Petras, *supra* note 36, at 69.

⁸⁸ Petras, *supra* note 36, at 19 (citing *Study on Civil/State Aircraft*, *supra* note 45, at 8); *see also* Buzdugan, *supra* note 76.

⁸⁹ *See Study on Civil/State Aircraft*, *supra* note 45, at 9-11; *see also* MILDE, *supra* note 45, at 72.

⁹⁰ MILDE, *supra* note 45, at 73.

⁹¹ Nicholas Grief, *Public International Law in the Airspace of the High Seas* 86 in *UTRECHT STUDIES IN AIR AND SPACE LAW* (G.C.M. Reijnen et al. eds. 1994).

⁹² *See* A.E. Gotlieb, *Canadian Practice in International Law During 1964 as Reflected in Correspondence and Statements of the Department of External Affairs*, 3 *CAN. YEARBOOK OF INT'L L.* 315, 316 (C.B. Bourne ed., 1965) (quoting a letter from the Secretary of State for External Affairs); *see also* ROACH & SMITH, *supra* note 80, at 466-71 (discussing the sovereign immunity of warships and military aircraft); GRIEF, *supra* note 91, at 86 (noting that the legal status of military aircraft is "best defined with reference to that of warships"); *cf.* SIGMAR STADLMEIER, *INTERNATIONAL COMMERCIAL AVIATION: FROM FOREIGN POLICY TO TRADE IN SERVICES* 1-2

thus a necessary and fundamental prerequisite to this grant of authority, which is, in turn, a key enabling element of global air mobility aircraft operations.

III. MILITARY AIRCRAFT COMMANDER AUTHORITY

Once again, the classification of military aircraft as sovereign instrumentalities that are immune from the jurisdiction of other states derives from the status ascribed warships under customary international law.⁹³ Ergo, like warships, military aircraft are, in a legal sense, a part of the territory of the nation whose flag they fly.⁹⁴ Flag-nation jurisdiction within the confines of the aircraft fuselage is therefore “territorial” in nature, meaning the aircraft and all onboard activities are the exclusive province of the flag nation and any offenses or other acts committed on board are thus considered to have been committed within its territory.⁹⁵ What’s more, corresponding to the powers vested in the commander of a warship by virtue of customary admiralty jurisdiction, the jurisdictional authority of the flag nation aboard military aircraft is embodied in the aircraft commander.⁹⁶

In practical terms, jurisdictional authority imparts to the military aircraft commander—or “pilot-in-command” (PIC), as he

(Marietta Benkö & Willem de Graaf eds., 1998) (discussing the roots of air law and the analogy between the legal regimes governing navigation at sea and in the air); SAMI SHUBBER, JURISDICTION OVER CRIMES ON BOARD AIRCRAFT 233–34 (1973) (noting the resemblance between the rights and duties of the aircraft commander and those of the master of a ship under English law); DIEDERIKS-VERSCHOOR, *supra* note 45, at 33–36 (contrasting the position of an aircraft commander with that of a ship’s captain). Compare, e.g., NAVAL WARFARE PUB. 1-14M, *supra* note 16, ¶ 2.2.2 (“U.S. Navy policy requires warships to assert the rights of sovereign immunity.”), with FOREIGN CLEARANCE MANUAL, *supra* note 16, ¶ C2.1.5.1 (“[I]t is U.S. policy to assert that [U.S. military aircraft] are entitled to the same privileges and immunities customarily accorded warships.”).

⁹³ See *supra* notes 79–80, 92 and accompanying text.

⁹⁴ See *supra* note 17 and accompanying text.

⁹⁵ See NAVAL WARFARE PUB. 1-14M, *supra* note 16, ¶ 3.11.1.3 (discussing the “Nationality Principle” as a basis for the exercise of criminal jurisdiction); see also HENKIN, *supra* note 17, at 234 (“The principle of territoriality has been invoked also to support regulation by the flag state of activities on board a vessel or aircraft.”); SHUBBER, *supra* note 92, at 52 n.16 (“[A]n aircraft like a ship may, for the purpose of jurisdiction, be regarded as being in the same position as territory.” (quoting R.Y. Jennings, *Regina v. Martin and Others*, 2 W.L.R. 975 (1956)—*Jurisdiction-Criminal Law-Offenses on State British Aircraft Abroad*, 5 INT’L & COMP. L.Q. 604, 605 (1956))); cf. DIGEST OF INT’L LAW, *supra* note 17, at 930, 933 (asserting that an offense committed on board a warship is considered to be committed within the jurisdiction of the nation to whom the ship belongs).

⁹⁶ See *supra* note 92 and accompanying text.

may be called⁹⁷—the power to speak in the name of the flag nation for purposes related to operation of the aircraft, to include the power to assert sovereign privileges or immunities in the face of encroachment or excessive claims of sovereignty by foreign states.⁹⁸ Alternatively, the aircraft commander may also validly consent to a boarding of the aircraft by foreign officials and thereby render it lawful under international law.⁹⁹ Furthermore, the status of military aircraft as equivalent to “moving territory” means that the aircraft commander may exercise “executive jurisdiction” over any offenses and acts committed on board in accordance with flag-nation law, regardless of where the aircraft is when the offense is committed.¹⁰⁰

⁹⁷ “Pilot-in-command” is defined as “[t]he pilot designated by the operator . . . as being in command and charged with the safe conduct of a flight.” ICAO, *Personnel Licensing, Annex 1 to the Convention on Int’l Civil Aviation*, ICAO Doc. ICAO/ANX/1 (10th ed. 2000) [hereinafter Chicago Convention, Annex 1]. The current practice of using the expression “pilot-in-command” (rather than “aircraft commander”) in the ICAO Annexes reinforces the “view that the person in command of the flight should, indeed be a pilot.” Aart A. van Wijk, *The Legal Status of the Aircraft Commander—Ups and Downs of a Controversial Personality in International Law*, in *ESSAYS IN AIR LAW* 311, 343 n.70 (Arnold Kean ed., 1982); see also U.S. DEP’T OF THE AIR FORCE, AIR FORCE INSTRUCTION 11-202, VOLUME 3, GENERAL FLIGHT RULES 6 (2006) [hereinafter AFI 11-202V3] (“The Pilot in Command (PIC) is responsible for, and is the final authority as to, the operation of the aircraft.”).

⁹⁸ Cf. WENDEL, *supra* note 18, at 167–68 (discussing the flag state’s delegation of jurisdictional authority to the ship captain); see also *supra* note 87 and accompanying text. By regulation, U.S. Air Force aircraft commanders are vested with authority necessary to accomplish the assigned mission. See Air Force Instruction (AFI) 11-2 Mission Design Series (MDS) Specific, Volume 3 instructions containing specific operational guidance unique to individual aircraft and crew positions (e.g., U.S. DEP’T OF THE AIR FORCE, AIR FORCE INSTRUCTION 11-2C-9, VOLUME 3, C-9 OPERATIONS PROCEDURES 15–16 (2000); U.S. DEP’T OF THE AIR FORCE, AIR FORCE INSTRUCTION 11-2KC-135, VOLUME 3, C/KC 135—OPERATIONS PROCEDURES 17 (2008); U.S. DEP’T OF THE AIR FORCE, AIR FORCE INSTRUCTION 11-2C-17, VOLUME 3, C-17 OPERATIONS PROCEDURES 18 (2005)); see also FOREIGN CLEARANCE MANUAL, *supra* note 16, ¶¶ C2.1.1.3, .2.1.3, .2.7.4 (detailing procedures for protest of inappropriate aviation-related charges and for responding to challenges to DoD aircraft operating in international airspace or transiting international straits or archipelagic sea lanes).

⁹⁹ Cf. WENDEL, *supra* note 18, at 167–68.

¹⁰⁰ “[Executive jurisdiction] refers to the activities of authorities when exercising their powers to enforce and ensure observance of the law” COUNCIL OF EUR. COMM. ON CRIME PROBLEMS, *Extraterritorial Criminal Jurisdiction*, at 7, Doc. COE.M.1.3/90 EX (1990). See ROBERT CRYER ET AL., *AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE* 44–45 (2d ed. 2010) (discussing the three types of jurisdiction: legislative, adjudicative, and executive); cf. DIGEST OF INT’L LAW, *supra* note 17, at 930 (discussing jurisdiction aboard warships); Wil-

At the same time, the jurisdictional authority of a military aircraft commander is limited in certain respects. First, it is temporary inasmuch as it is generally in force only for the duration of a given flight or mission.¹⁰¹ In addition, the aircraft commander's authority is normally subsidiary to that of organs that officially represent the flag nation in international relations¹⁰²—e.g., “the head of State, the government and its head, and the minister of foreign affairs.”¹⁰³ So, for example, although the ability to effect a “protest” of a foreign power's infringement on aircraft sovereignty¹⁰⁴ may reasonably be inferred as being within the scope of the military aircraft commander's jurisdictional authority,¹⁰⁵ the aircraft commander would not be considered competent to give “recognition” (in an international legal context) to what would otherwise be regarded by the govern-

liams, *supra* note 46, at 104; BOCZEK, *supra* note 74, at 321; SHUBBER, *supra* note 92, at 48–61.

¹⁰¹ Cf. WENDEL, *supra* note 18, at 169 (noting that “[t]he jurisdiction delegated by the flag State to the captain is temporary only”); see also DIEDERIKS-VERSCHOOR, *supra* note 45, at 33–34; see, e.g., AFI 11-202V3, *supra* note 97, at 23 (providing that the aircraft commander (or “pilot in command”) is designated via the flight authorization for all flights of U.S. Air Force aircraft); ICAO, *Rules of the Air, Annex 2 to the Convention on Int'l Civil Aviation*, ¶ 2.4, ICAO Doc. ICAO/ANX/2 (10th ed. 2005) [hereinafter Chicago Convention, Annex 2] (“The pilot-in-command of an aircraft shall have final authority as to the disposition of the aircraft *while in command*.”) (emphasis added).

¹⁰² Cf. WENDEL, *supra* note 18, at 169 (“The jurisdiction delegated by the flag state to the captain is . . . definitely subsidiary to the powers of official authorities of the flag State.”); see, e.g., DoDD 4500.54E, *supra* note 16, at 2 (“DoD aircraft commanders shall not consent to the exercise of jurisdiction by foreign government authorities over U.S. military aircraft, except at the direction of the appropriate DoD Component headquarters.”); FOREIGN CLEARANCE MANUAL, *supra* note 16, ¶ DL1.12 (“DoD aircraft, and personnel, cargo[,] and equipment that remain on board DoD aircraft are exempt from search or inspection by foreign authorities except by direction of the appropriate DoD Component headquarters or the U.S. Embassy in the foreign country.”); NAVAL WARFARE PUB. 1-14M, *supra* note 16, ¶ 3.3.1.2 (“Commanders of U.S. warships, military aircraft, and military installations in territories under foreign jurisdiction . . . are not authorized to receive on board foreign nationals seeking asylum. Such persons should be referred to the American Embassy or nearest U.S. consulate.”).

¹⁰³ Krzysztof Skubiszewski, *Unilateral Acts of States*, in INTERNATIONAL LAW: ACHIEVEMENTS AND PROSPECTS 221, 230 (Mohammed Bedjaoui ed., 1991).

¹⁰⁴ *Id.* at 227 (“The protest is an act whereby the State expresses its opposition to a situation, a claim or, generally, a state of things and the ensuing legal consequences. As a result, what is protested against is now brought in question in the relations between the States concerned.”).

¹⁰⁵ See *supra* note 98 and accompanying text; see also Skubiszewski, *supra* note 103, at 230 (noting that a valid unilateral act may be done only by one authorized to speak on behalf of the state in the particular field or matter).

ment of the flag nation as an invalid or excessive claim of sovereignty by a foreign state,¹⁰⁶ or to "waive" sovereign immunity on behalf of the flag nation,¹⁰⁷ unless expressly authorized to do so.¹⁰⁸

Yet, it should be noted that unlike waiver, which must be clear and specific in content and cannot be presumed or inferred from a failure to act,¹⁰⁹ recognition can, in certain circumstances, be implied from acquiescence or silence or, in other words, *a failure to protest*.¹¹⁰ Therefore, in cases where a military aircraft commander is authorized or would normally be expected to protest the exercise of enforcement jurisdiction over his aircraft by a foreign state, failure to do so may be deemed tantamount to flag-nation recognition of the legitimacy of the underlying legal basis for the foreign state's actions.¹¹¹ In the short term, this would likely hamper flag-nation enforcement of the sovereign immunity of its military aircraft, particularly vis-à-

¹⁰⁶ Some examples of situations calling for recognition include:

[T]he birth of States, non-constitutional change of governments, the status of insurgents, position of nations and peoples pursuing their right to self-determination, territorial change and revision of frontiers if not brought about by regular treaties, regimes of parts of territory if modified or uncertain, and rights and claims if in dispute or doubt.

Skubiszewski, *supra* note 103, at 227; *see also* PETER MALANCZUK, Akehurst's Modern Introduction to International Law 154-55 (7TH ED. 1997).

¹⁰⁷ "Waiver . . . is an act whereby the State gives up its claim, right, competence, or power, which consequently cease to exist." Skubiszewski, *supra* note 103, at 229; *see also* VLADIMIR-DURO DEGAN, SOURCES OF INTERNATIONAL LAW 272 (1997) (defining waiver as an act "by which [a State] renounces some of its subjective rights").

¹⁰⁸ *See supra* notes 94-103 and accompanying text.

¹⁰⁹ *See* DEGAN, *supra* note 107, at 272-73; BOCZEK, *supra* note 74, at 35; Skubiszewski, *supra* note 103, at 229. *But see* BOCZEK, *supra* note 74, at 35 (waiver may be "tacit"); Skubiszewski, *supra* note 103, at 229 (noting that in the case of Certain Norwegian Loans (Fr. v. Nor.), 1957 I.C.J. 9, *digested in* 51 AM. J. INT'L L. 777 (1957), the Court's holding that waiver "must be declared expressly" was "too rigid" and that implicit waiver cannot be excluded "provided it is unequivocal").

¹¹⁰ *See* Skubiszewski, *supra* note 103, at 228 ("[N]o general rule can be stated on the absence of protest, in other words on the effect of silence and failure to react. The essential question is whether the situation calls for a reaction if some legal consequences are to be avoided."); *see also* MALANCZUK, *supra* note 106, at 154 ("[R]ecognition may take the form of an express statement, or may be inferred from acquiescence . . . [but] failure to protest a purely verbal assertion . . . does not constitute acquiescence.").

¹¹¹ Skubiszewski, *supra* note 103, at 227-28, 230; *see also* MALANCZUK, *supra* note 106, at 154.

vis the foreign-state violator in question.¹¹² But over the long term, an accumulation of such failures could serve to erode the sovereign interests of the flag nation to the point that the unlawful claim or exercise of enforcement jurisdiction by the foreign state would become legally valid through a change in customary international law.¹¹³

Beyond the jurisdictional authority that flows from the sovereign immunity of military aircraft, however, the authority of military aircraft commanders falls mainly outside the ambit of international law. This is not to say that the subject has been ignored; to the contrary, the importance of the position has been recognized since the very dawn of aviation.¹¹⁴ In fact, modern air law was arguably born amidst international declarations about the legal status of “military aeronauts” (balloon pilots) in the latter half of the 19th century.¹¹⁵ The 1923 Draft Hague Rules of Air Warfare, which, though never ratified, won general approval from most of the world’s jurists at the time,¹¹⁶ likewise attempted to regulate the position.¹¹⁷ And, more recently, the ICAO Assembly has established a practice of continually adopting a Resolution (without exception unanimously) recognizing that “to the extent practicable” state aircraft should be operated in compliance with Annex 2 to the Chicago Convention,¹¹⁸ which conspicuously endows the “pilot-in-com-

¹¹² Skubiszewski, *supra* note 103, at 227 (“[T]he recognizing State cannot contest what it has recognized.”); see also MALANCZUK, *supra* note 106:

It is sometimes said that recognition or acquiescence gives rise to an estoppel . . . [which] has the effect of making it *impossible* for a party to contradict its previous acts, behavior or statements, as in English law; in other cases it is merely evidential (that is, its effect is simply to make it *difficult* for a party to contradict its previous conduct).

(citations omitted).

¹¹³ DEGAN, *supra* note 107, at 273.

¹¹⁴ SHUBBER, *supra* note 92, at 53.

¹¹⁵ See van Wijk, *supra* note 97, at 311–14; see also MATTE, *supra* note 19, at 282; DIEDERIKS-VERSCHOOR, *supra* note 45, at 33.

¹¹⁶ See Richard H. Wyman, *The First Rules of Air Warfare*, 35 AIR U. REV. 94 (1984), available at <http://www.airpower.au.af.mil/airchronicles/aureview/1984/mar-apr/wyman.html>.

¹¹⁷ See Rules Concerning the Control of Wireless Telegraphy, *supra* note 37, art. 14.

¹¹⁸ MILDE, *supra* note 45, at 68; see ICAO, *Consolidated Statement of Continuing ICAO Policies and Associated Practices Related Specifically to Air Navigation*, Assemb. Res. A36-13, app. O, compiled in *Assembly Resolutions in Force*, at II-18, ICAO Doc. 9902 (Sep. 27, 2007), available at http://www.icao.int/icaonet/dcs/9902/9902_en.pdf.

mand”¹¹⁹ with “final authority as to the disposition of the aircraft while in command.”¹²⁰ Nevertheless, once military aircraft were enshrined in the Paris Convention as sovereign instrumentalities with the same privileges and immunities as warships,¹²¹ military aircraft commander authority was largely subsumed within the sphere of national sovereignty.¹²²

Still, noteworthy is the Draft Convention on the Legal Status of the Aircraft Commander (Draft Convention), which appeared on the agenda of the First ICAO Assembly in 1947.¹²³ In particular, Article 2 of this proposed treaty delineated the operational authority of the aircraft commander, providing that during flight the aircraft commander—

(a) shall be in charge of the aircraft, the crew, the passengers, and the cargo; (b) has the right and the duty to control and direct the crew and the passengers to the full extent necessary to ensure order and safety; (c) has the right, for good reason, to

¹¹⁹ Annex 6 to the Chicago Convention defines “pilot-in-command” as “the pilot responsible for the operation and safety of the aircraft during flight time” and charges him with responsibility “for the operation and safety of the aeroplane and for the safety of all persons on board during flight time.” ICAO, *Operation of Aircraft, Annex 6 to the Convention on International Civil Aviation, Part I, International Commercial Air Transport—Aeroplanes*, ICAO Doc. ICAO.ANX.6 (8th ed. 2006); see also Russell Kane & Tony Pyne, *The Legal Status and Liability of the Copilot* (pt. 1), 19 AIR & SPACE L. 290, 291 (1994) (noting that “Annex 6 is liberal in ascribing responsibilities and duties to the pilot in command, [but] it is silent on the subject of his authority.”).

¹²⁰ Chicago Convention, Annex 2, *supra* note 101, at 6; see also van Wijk, *supra* note 97, at 325 (discussing efforts of ICAO’s Air Navigation Commission to address the issue of whether a pilot-in-command has the legal authority necessary to fulfill his Annex 6 responsibilities); cf. DIEDERIKS-VERSCHOOR, *supra* note 45, at 35 (noting that “the Annexes of the Chicago Convention contain a number of recommendations regarding the commander’s conduct, but although they are usually observed in practice they do not have force of law”).

¹²¹ Paris Convention, *supra* note 48, art. 32, 11 L.N.T.S. at 195.

¹²² See MATTE, *supra* note 19, at 282; see also MILDE, *supra* note 45, at 67–69 (discussing ICAO’s authority to legislate in the form of Standards and Recommended Practices on any issues relating to military aircraft); cf. van Wijk, *supra* note 97, at 334 (noting that “the majority of the [1980 ICAO Panel of Experts on the Legal Status of the Aircraft Commander] felt . . . no further authority should be delegated to the aircraft commander, warning having been given in the Panel that a solution of certain problems would be closely related to matters of national sovereignty”); Kane & Pyne, *supra* note 119, at 291 (“The authority of the pilot in command, or of the commander as he may be termed, is more likely to be established by [domestic legislation].”).

¹²³ ICAO, *Draft Convention on the Legal Status of the Aircraft Commander* (as revised at Paris by the Legal ad hoc Committee), ICAO Doc. 4006 (1947) [hereinafter Draft Convention], available at <http://www.icao.int/icao/en/assembly/a01/commission4.html>.

disembark any number of the crew, or passengers at an intermediate stop; [and] (d) has disciplinary power over members of the crew within the scope of their duties, in case of necessity, of which he shall be sole judge, he may assign temporarily any member of the crew to duties other than those for which he is engaged.¹²⁴

Remarkably, the legal status of the aircraft commander has been under official consideration by ICAO since this draft accord was introduced, albeit perhaps not always actively so.¹²⁵ Yet, aside from those aspects of aircraft-commander authority focused on preventive action against hijackers that were broken out and ultimately incorporated into the 1963 Tokyo Convention,¹²⁶ there has actually been little substantive change to the principles espoused in the 1947 Draft Convention's theoretical framework.¹²⁷ In point of fact, while an actual convention on the legal status of the aircraft commander remains in limbo,¹²⁸ Professor Diederiks-Verschoor has suggested that, based on custom and practice, the operational powers and responsibilities of

¹²⁴ *Id.* art. 2.

¹²⁵ See Gerald F. Fitzgerald, *The Development of International Rules Concerning Offences and Other Certain Acts Committed on Board Aircraft*, 1 CAN. Y.B. INT'L L. 242 n.26 (1963); van Wijk, *supra* note 97, *passim*; DIEDERIKS-VERSCHOOR, *supra* note 45, at 33–34.

¹²⁶ Convention on Offences and Certain Other Acts Committed on Board Aircraft, Sept. 14, 1963, 20 U.S.T. 2941, 704 U.N.T.S. 219 [hereinafter Tokyo Convention], reprinted in Maria Buzdugan, "Chicago" Acts and Related Protocols, XXX-1 ANNALS AIR & SPACE L. 183 (2005). Articles 5 through 10 of the Tokyo Convention give the aircraft commander the power "to subdue and assert control over an individual who commits a criminal act or an act that jeopardizes the safety of the aircraft or persons or property thereon" DEMPSEY, *supra* note 43, at 239; see also 2 ENCYCLOPAEDIA OF INTERNATIONAL TERRORISM: TERRORISM IN WORLD COUNTRIES 46 (Verinder Grover ed., 2002).

Under the Tokyo Convention of 1963 a pilot-in-command has been given powers that he can take any preventive action against hijackers or any other criminal on board the aircraft, so as to ensure the safety of [the] aircraft and its occupants. This convention defines offences against penal law, and applies to aircraft in flight or over high seas and in any area outside the territory of a state.

¹²⁷ See Fitzgerald, *supra* note 125; DIEDERIKS-VERSCHOOR, *supra* note 45, at 33–34.

¹²⁸ See van Wijk, *supra* note 97, at 334.

It can be noted that the majority of the [1980 ICAO Panel of Experts on the Legal Status of the Aircraft Commander] felt that . . . no further authority should be delegated to the aircraft commander, warning having been given in the Panel that a solution of certain problems would be closely related to matters of national sovereignty.

the aircraft commander can be generally categorized as including:

- (1) The responsibility for the condition of the aircraft and the welfare of the crew, the preparations for the flight[,] and its successful completion [This] includes the commander's duty to obtain the proper flight documents and the cargo manifests, to carry out pre-takeoff checks, etc.
- (2) The right . . . to issue strict orders to crew and passengers
- (3) [T]he authority to undertake all necessary measures to ensure the safe completion of the flight
-
- (4) [And the authority to] decide[] whether and in what way to render assistance in search and rescue operations in the event of an accident.¹²⁹

Though these civil air law precepts are not binding on military aviation,¹³⁰ they are notably manifest in national guidelines that circumscribe military aircraft commander authority. For example, in accordance with U.S. military regulations governing flight rules and operations procedures for various types of mobility aircraft, an aircraft commander (or pilot-in-command) is designated on the orders for all flights.¹³¹ Regulations further empower the individual so-designated with a full array of authorities and responsibilities relative to flight operations of the air-

¹²⁹ See DIEDERIKS-VERSCHOOR, *supra* note 45, at 34–35. According to Dr. Diederiks-Verschoor, the powers and responsibilities of aircraft commanders also include the duty to register births and deaths and authority to perform marriages and oversee the drawing up of wills on board the aircraft. *Id.* at 34; *cf.* MATTE, *supra* note 19, at 292 (“The activities of the aircraft commander are numerous and diverse, requiring . . . the commander’s presence during certain events beyond human control [that] may occur on board the aircraft, such as births or deaths during the flight”); *but see* Ludovico M. Bentivoglio, *Conflicts Problems in Air Law*, in 119 RECUEIL DE COURS: COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 69, 120 (No. 3, 1966):

With respect to [births, deaths, and marriages], . . . States are scarcely willing to entrust the aircraft’s commander with an authority comparable to the one generally recognized to the captain of a sea-going vessel. In fact, the above-mentioned draft convention on the legal status of the air commander, prepared by [ICAO], confined the function of the said commander, in the matter of status changes occurring on board, to the recording of births and deaths only.

¹³⁰ See *supra* note 122 and accompanying text; *see also* HAANAPPEL, *supra* note 53, at 44.

¹³¹ See AFI 11-202V3, *supra* note 97, at 23.

craft, which, for the most part, parallel those ascribed to their civil aviation counterparts (*see* Table 1).¹³²

Table 1. Aircraft Commander Operational Authorities & Responsibilities.

International Custom & Practice	U.S. DoD & Air Force Regulations
(1) The responsibility for the condition of the aircraft and the welfare of the crew, the preparations for the flight and its successful completion, to include the duty to obtain proper flight documents and the cargo manifests, to carry out pre-flight checks, etc.	<p>Aircraft commanders are:</p> <ul style="list-style-type: none"> • Responsible for ensuring airworthiness of the aircraft, within limits established by the flight manual and the operating procedures established by the lead command, before flight. • Responsible for the welfare of aircrew members, Mission Essential Ground Personnel (MEGP), and passengers. • Responsible for verifying diplomatic clearance requirements prior to departure. • Responsible for compliance with requirements for transport of hazardous materials.
(2) The authority to issue strict orders to crew and passengers.	<ul style="list-style-type: none"> • In command of all persons aboard the aircraft (to include all military personnel regardless of rank).
(3) The authority to undertake all necessary measures to ensure the safe completion of the flight.	<ul style="list-style-type: none"> • Responsible for the safe accomplishment of the mission. <p>(Note: In the case of air-to-air refueling tankers, aircraft commanders' responsibilities include ensuring separation between the tanker and the receiver aircraft.)</p> <ul style="list-style-type: none"> • Authorized to refuse/delay a mission for safety reasons. • Authorized to disclose classified information if necessary to avoid endangering the flight. • The final authority for requesting or accepting aircrew or mission waivers.
(4) The authority to decide whether and how to render assistance in search and rescue operations in the event of an accident.	<ul style="list-style-type: none"> • Authorized to render emergency assistance to a person, ship, or aircraft, whose position within the territorial sea or archipelagic waters of another state is reasonably well known, and is in danger or distress because of perils of the sea.

In practical terms, military aircraft commander authority can thus be viewed as effectively having two elements: the first emanating from the sovereignty of military aircraft and the flag nation's delegation of jurisdictional authority and thereby placing the aircraft commander in the role of representative of the aircraft's "territorial sovereign;" and the second, generally delineated by domestic laws and regulations, relating to the aircraft

¹³² *E.g.*, Air Force Instruction (AFI) 11-2 Mission Design Series (MDS) Specific, Volume 3, instructions cited *supra* note 98; AFI 11-202V3, *supra* note 97, at 23; U.S. DEP'T OF THE AIR FORCE, AIR FORCE JOINT INSTRUCTION 11-204, OPERATIONAL PROCEDURES FOR AIRCRAFT CARRYING HAZARDOUS MATERIALS 2-3 (1994); U.S. OFFICE OF THE CHAIRMAN OF THE JOINT CHIEFS OF STAFF (CJCS), CJCSI INSTRUCTION 2410.01C, GUIDANCE FOR THE EXERCISE OF RIGHT-OF-ASSISTANCE ENTRY 1-3 (2007).

commander's technical functions.¹³³ Normally, these two elements of aircraft commander authority are exercised seamlessly and in tandem. However, military aircraft are also normally operated by the armed forces of the flag nation, in which case the flag nation alone commands and controls the aircraft and its crew through a single national military command structure empowered with the legal authority to issue orders and compel obedience. In contrast, the commander of a foreign flagged state aircraft can be subject to multiple chains of command (e.g., a "multinational command authority overseeing the operation" and his own "national command authority"), as well as multiple regulatory authorities with variations of rules pertaining to his conduct as the aircraft commander and/or operation of the aircraft.¹³⁴ This dichotomy, along with some of the unique organizational aspects of the SAC partnership, arguably places the SAC C-17 aircraft commander in a position of all-but-inevitable conflict.

IV. THE SAC PARTNERSHIP ANOMALY

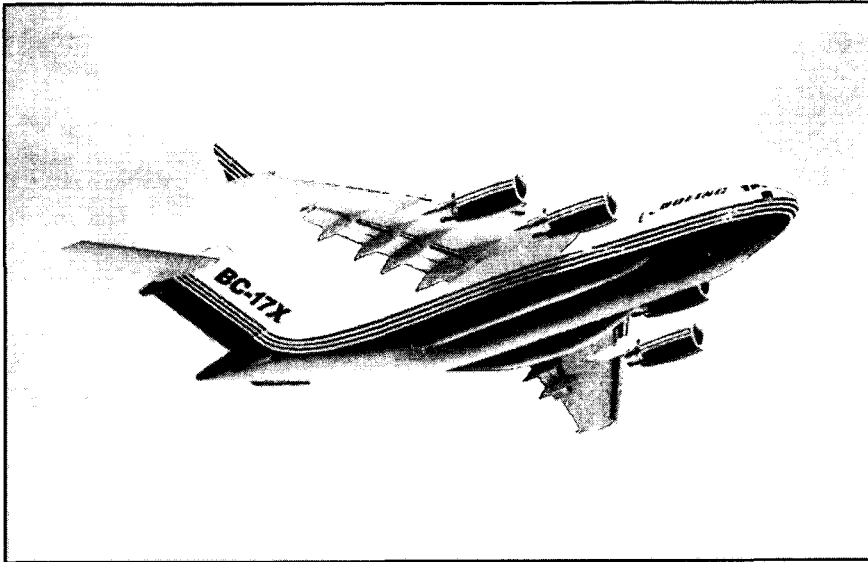
Recall that international law has not settled on a common definition for either state or military aircraft; thus, while some states might steadfastly characterize any aircraft owned, marked, and operated by the armed forces of a nation as a state/military aircraft *per se*, for others the legal status of an aircraft as state/military could depend on the particulars of a given flight and/or whether the aircraft operator is reimbursed for the flight by a third party.¹³⁵ Because of the NAEW&CF's standing as a full NATO Command headquarters and the unquestionably military character of the C2ISR mission, the question of the status of the E-3A Component's AWACS aircraft is largely moot. However, the same cannot necessarily be said of the SAC C-17s. In contrast to the distinctively military AWACS aircraft, which have been described as "a militarised Boeing 707 with a rotating disk-like rotodome housing a long-range radar attached to its fuse-

¹³³ Cf. Kane & Pyne, *supra* note 119, at 290-92 (noting that the authority of the commercial aircraft commander has multiple dimensions, to include those granted pursuant the Chicago Convention and its Annexes and other international air law instruments, those established by domestic legislation, and, finally, those that arise from his contracts with his employer).

¹³⁴ CANNA, *supra* note 12, at 7-8.

¹³⁵ See *supra* notes 47-65 and accompanying text.

lage,”¹³⁶ military air transport technologies like the C-17 have largely identical civil equivalents.¹³⁷ Indeed, “the ease with which civil aircraft [and, particularly, transport aircraft] could be converted to military use and *vice-versa*” has been a sticking point for jurists, scholars, diplomats, and statesmen concerned with the formation of international air law and the distinction between “civil” and “military” aircraft since the very inception of aviation.¹³⁸



Depiction of the Boeing BC-17X aircraft—
a proposed commercial variant of the C-17

(Photo: <http://www.boeing.com/companyoffices/gallery/images/md17/inflight.html>)

¹³⁶ NATO, AWACS: NATO'S EYES IN THE SKY, http://www.nato.int/cps/en/natolive/topics_48904.htm; see also AFI 10-420, *supra* note 35 (“Combat air forces” consist of “[a]ir forces that are directly engaged in combat operations,” to include, *inter alia*, “command and control; . . . and intelligence, surveillance, and reconnaissance aircraft.”).

¹³⁷ See, e.g., Press Release, Boeing, MD-17 Receives FAA Certification (Aug. 28, 1997), available at http://www.boeing.com/news/releases/1997/news_release_970828n.html (on airworthiness certification of Boeing's MD-17—a commercial variant of the C-17); Press Release, Boeing, Boeing is Undisputed Leader In Providing Air Cargo Capacity (Sept. 28, 2000), available at http://www.boeing.com/news/releases/2000/news_release_000928a.html (announcing Boeing's BC-17X, formerly known as the MD-17); Brochure, Boeing, BC-17/C-17A Airport Compatibility 2 (2005), <http://www.boeing.com/commercial/airports/acaps/bc17-c17a-brochure.pdf> (providing airport compatibility information for the BC-17 aircraft—“a commercial variant of the C-17A sharing the same external dimensions”).

¹³⁸ MILDE, *supra* note 45, at 63; see generally *id.* at 60–74.

Furthermore, as noted before, the SAC partnership's operational arrangement, whereby its NAMO-owned C-17 aircraft bear Hungarian Air Force markings and purportedly function as Hungarian state aircraft—though similar to that of the NATO E-3A Component, whose multinational AWACS aircraft fly under the flag of the Grand Duchy of Luxembourg—is nonetheless distinguishable because neither the SAC partnership nor its operational arm, the HAW, is a NATO organization nor, for that matter, has a legal personality.¹³⁹ SAC participants therefore independently determine for themselves how to best make use of their flight hours. Additionally, inasmuch as the SAC partnership was created and continues to function outside the auspices of NATO, it does not share the legal personality or military character of the alliance's command structure,¹⁴⁰ nor is it in and of itself a military organization.¹⁴¹ And while the HAW is generally described as "a multinational military unit,"¹⁴² it likewise lacks any legal status whereby its operations in furtherance of the "national requirements" and/or "multinational commitments" of its participants can be deemed military per se.¹⁴³ Consequently, when viewed in light of the ambiguities in the international air law regime relative to the classification of state and military aircraft discussed previously, the SAC partnership's organizational construct can actually serve to obfuscate the legal status of its C-17 aircraft and, therefore, the associated authorities of its aircraft commanders as well, and so may make both more open to question.

Perhaps recognizing the shortcomings of this arrangement and the potential implications for the status of SAC C-17 aircraft, SAC architects seemingly sought to clarify the matter through the partnership's foundational document, the SAC MOU. To start with, the MOU specifies that the SAC C-17s "will not be used for commercial purposes or controlled by commercial entities."¹⁴⁴ Though this prohibition appears to simply reinforce usage restrictions imposed via the U.S. Foreign Military Sales (FMS) program under which two of the three SAC C-17s

¹³⁹ SAC MOU, *supra* note 11, § 19.1.2.

¹⁴⁰ *See id.* § 5.3.

¹⁴¹ *Id.* § 3.1.1.

¹⁴² *Id.* § 2.

¹⁴³ *See id.* §§ 3.1.1, 19.1.2.

¹⁴⁴ *Id.* § 3.1.1.

were acquired,¹⁴⁵ whereby any transfer or change in the end-use of any U.S.-origin defense article acquired through the FMS program is prohibited without U.S. government approval,¹⁴⁶ it may nonetheless also be viewed as reflecting an underlying agreement among participants to altogether exclude commercial uses from the scope of SAC C-17 operations. The MOU further states: "The C-17 aircraft will be marked and registered in accordance with the appropriate laws and regulations of the Flag Nation. The C-17 aircraft are considered state aircraft for military purposes of the Flag Nation. . . . The Flag Nation will serve as the operating nation."¹⁴⁷

Based on the foregoing provisions, the *intent* of participant nations to confer state (military) aircraft status on the SAC C-17s may therefore be unambiguous. However, much like the status of military aircraft under international law generally, the legal status actually afforded the SAC aircraft by virtue of these terms is neither "particularly transparent" nor "unequivocal,"¹⁴⁸ since ultimately, by operation of the MOU, their status can only be conclusively established by looking to the domestic law of the flag nation—i.e., the Republic of Hungary.¹⁴⁹

Hungarian national requirements for the registration and marking of state aircraft are actually set forth in part 3, chapter I, sections 12 through 18, of the country's Air Traffic Act (Act),¹⁵⁰ as supplemented by certain government and Minister of Defense decrees.¹⁵¹ Specifically, the Act provides that respon-

¹⁴⁵ The first of the three SAC C-17s was furnished by the U.S. as a non-financial contribution to the SAC partnership in accordance with the SAC MOU. *Id.* § 8.5.1.1; *see also* Department of Defense Participation in Strategic Airlift Capability Partnership, Pub. L. No. 110-181, § 1032(d), 122 Stat. 306 (2008).

¹⁴⁶ *See* DEF. INST. OF SEC. ASSISTANCE MGMT. (DISAM), THE MANAGEMENT OF SECURITY ASSISTANCE 1-2, 2-8 (Gregory W. Sutton & Kenneth W. Martin eds., 27th ed. 2007), *available at* <http://www.disam.dsca.mil/pubs/DR/27th%20Greenbook.pdf> [hereinafter DISAM GREENBOOK] (providing a detailed examination of the U.S. Foreign Military Sales (FMS) Program and the purpose of arms sales).

¹⁴⁷ SAC MOU, *supra* note 11, § 14.1.

¹⁴⁸ *See* MILDE, *supra* note 45, at 61.

¹⁴⁹ *See* Col. Frank Fedele, *Overflight by Military Aircraft in Time of Peace*, 9 A.F. JAG L. REV. 8, 14 (1967) (citing MYRES S. MCDUGAL, ET AL., LAW AND PUBLIC ORDER IN OUTER SPACE 568 (1963)).

¹⁵⁰ Act XCVII of 1995 on Air Traffic (1996) (Hung.) [hereinafter Air Traffic Act].

¹⁵¹ Gov't Decree No. 141/1995 (30.11.) on the implementation of Act 97 of 1995 governing Air Traffic (1996) (Hung.) [hereinafter Hung. Gov't Decree No. 141/1995]; *see also* Decree of the Minister of Defence No. 21/1998 (12.21.) on registration, manufacture, repair, and airworthiness certification of state-owned aircraft (1998) (Hung.) [hereinafter Hung. MOD Decree No. 21/1998].

sibility for state aircraft, including registration, rests with the Directorate of Air Transport of Hungary's National Transport Authority, acting in its capacity as "Military Air Affairs Authority."¹⁵² Moreover, although the Act generally equates "state aircraft" with aircraft that are "state-owned,"¹⁵³ it implicitly allows for aircraft other than state-owned aircraft to "qualify" as Hungarian state aircraft provided they are duly registered by the Military Air Affairs Authority in both the national aircraft registry and the Authority's own aircraft registry.¹⁵⁴

The SAC C-17s have, in fact, been registered by the Hungarian Military Air Affairs Authority so as to qualify as Hungarian state aircraft under the Act, and therefore bear appropriate markings.¹⁵⁵ However, as alluded to previously, the lack of international consensus on the definition of military aircraft means that it is conceivable that even if the SAC aircraft were to be (by operation of the MOU) considered part of the Hungarian armed forces, they can nevertheless be classified as civil if used for what some might characterize as a "civil flight."¹⁵⁶ Obviously, the same thing could possibly be said about any apparently military aircraft, including the NATO AWACS aircraft;¹⁵⁷ but, once more, the character of a flight as military or civil is more amorphous in the case of transport aircraft like the C-17 and is further complicated here by the absence of any specific common-usage standard among SAC participants, as well as by the lack of legal status on the part of either the SAC or its operational subdivision, the HAW. The bottom line, therefore, is that without a definitive statement of the Hungarian government's position on whether and under what circumstances state/military aircraft may be classified as

¹⁵² Hung. Gov't Decree No. 141/1995, *supra* note 151, §§ 2(1)(a), 2(3)(b); *see also* Hung. MOD Decree No. 21/1998, *supra* note 151, § 4.

¹⁵³ Hung. MOD Decree No. 21/1998, *supra* note 151, § 1.

¹⁵⁴ Air Traffic Act, *supra* note 150, § 12. Notably, U.S. law, in contrast, exempts "aircraft of the national defense forces of the United States" from FAA aircraft registration requirements. 49 U.S.C. § 44101 (2006).

¹⁵⁵ Republic of Hung., Nat'l Transp. Auth., Dir. for Air Transp., Certificate of Registration No. 56/301 (Jul. 14, 2009); Republic of Hung., Nat'l Transp. Auth., Dir. for Air Transp., Certificate of Registration No. 56/302 (Sep. 17, 2009); Republic of Hung., Nat'l Transp. Auth., Dir. for Air Transp., Certificate of Registration No. 56/303 (Oct. 7, 2009) (on file with author); *see also* Air Traffic Act, *supra* note 150, § 18.

¹⁵⁶ Bourbonniere & Haeck, *supra* note 45, at 904; *see also supra* note 55 and accompanying text.

¹⁵⁷ *See supra* note 53 and accompanying text.

civil, the SAC C-17s' registration and markings cannot be deemed to conclusively establish their legal status.

Because the aircraft commander's international standing and authority as representative of the flag nation derive from the status of military aircraft as sovereign instrumentalities, any uncertainty over the legal classification of the SAC C-17s as military or civil could have major implications for foreign pilots commanding the aircraft, as well as for SAC nations utilizing the aircraft to meet their strategic airlift needs. Consider that consistent with U.S. policy a military pilot commanding a U.S. Air Force (USAF) C-17 is at all times vested with sovereign authority, to include the power to exercise executive jurisdiction and assert state aircraft privileges or immunities on behalf of the flag nation.¹⁵⁸ This enables the aircraft commander to act semi-autonomously within the limits of his authority in responding to excessive claims of sovereignty or jurisdictional rights by foreign states that can threaten the success of both the airlift mission and the overall operation it is supporting. For instance, in the case of a C-17 transiting international airspace en route to deliver a field hospital to the site of a natural disaster, a delay in flight time for rerouting or to ask permission to overfly necessitated by excessive maritime claims that are inconsistent with, or in direct violation of, international law could not only cause the aircraft to miss its landing time slot and thereby prevent timely delivery of the medical supplies and personnel, but could, in turn, also lead to the deaths of disaster victims in need of acute care. Continuously armed with sovereign authority, the commander of a USAF C-17 could assuredly invoke the "due regard" prerogative for state aircraft under such circumstances to keep the mission on track,¹⁵⁹ whereas doubt over the status of aircraft under Hun-

¹⁵⁸ See *supra* note 98 and accompanying text.

¹⁵⁹ As state aircraft, military aircraft are not bound by ICAO rules and procedures. Chicago Convention, *supra* note 11, art. 3(a)–(b). U.S. policy requires DoD aircraft operating in international airspace to follow ICAO flight procedures whenever practical and compatible with mission requirements, but recognizes that certain operational situations may not lend themselves to these procedures. Flights conducted under the "due regard" prerogative must provide a level of safety equivalent to that normally given by ICAO air traffic control agencies and fulfill U.S. government obligations under Article 3 of the Chicago Convention to show "due regard for the safety of navigation of civil aircraft." U.S. DEP'T OF DEFENSE, DEPARTMENT OF DEFENSE INSTRUCTION 4540.01, USE OF INTERNATIONAL AIRSPACE BY U.S. MILITARY AIRCRAFT AND FOR MISSILE/PROJECTILE FIRINGS, ¶ 6.3.2 (2007); see also U.S. DEP'T OF DEFENSE, NAT'L GEOSPATIAL-INTELLIGENCE AGENCY, DEPARTMENT OF DEFENSE FLIGHT INFORMATION PUBLICATION, GENERAL PLANNING, ¶ 8-7 (2009); FOREIGN CLEARANCE MANUAL, *supra* note 16, ¶ C2.2 (2009).

garian law, whether, for example, due to the nature of the flight or the possibility of third-party imbursement for the flight hours, might inhibit the ability of that pilot, or otherwise make him reluctant to do so, when at the controls of SAC C-17, and thereby jeopardize the mission.

Furthermore, even if the status of the SAC C-17s as state/military aircraft is presumed established, for U.S. military pilots, in particular, commanding a foreign flagged state aircraft presents additional legal concerns that go beyond the potential vagaries of the aircraft's legal character. Namely, the Emoluments Clause of the U.S. Constitution provides that "no Person holding any Office of Profit or Trust under [the United States], shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, *of any kind whatever*, from any King, Prince, or foreign State."¹⁶⁰ This provision was intended to "preserv[e] foreign Ministers and other officers of the U.S. independent of external influence" by foreign governments,¹⁶¹ and applies to officers in both foreign and *military* service.¹⁶²

As alluded to at the outset, the United States has promulgated policies with respect to command and control of American forces participating in multinational organizations and partnerships.¹⁶³ However, these rules are primarily aimed at reinforcing the Commander-in-Chief Clause of the Constitution, which requires that the chain-of-command over the nation's military forces that flows from the President of the United States to U.S. commanders in the field remain inviolate, *even* in an alliance or coalition setting.¹⁶⁴ Here, command authority over U.S. forces contributed to the HAW is not per se an issue, since, in accordance with the MOU, the HAW commander is given only "operational control" of forces, while "command authority" is retained by the contributing SAC participant.¹⁶⁵ The HAW command structure is thus consistent with the Commander-in-Chief Clause and implementing policies, whereby the President holds

¹⁶⁰ U.S. CONST. art. I, § 9, cl. 8 (emphasis added).

¹⁶¹ 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 389 (Max Farrand ed., rev. ed. 1966) (notes of James Madison); *see also id.* at 327 ("It was thought proper, in order to exclude corruption and foreign influence, to prohibit any one in office from receiving or holding any emoluments from foreign states." (remarks of Governor Randolph)).

¹⁶² *See* U.S. CONST. art. II, § 3 (The President commissions "all the Officers of the United States.").

¹⁶³ *See supra* notes 12-14 and accompanying text.

¹⁶⁴ U.S. CONST. art. I, § 8, cl. 11; *see also* Exec. Summary, *supra* note 13, at 808.

¹⁶⁵ SAC MOU, *supra* note 11, § 16.

“the ultimate and undelegable (outside the [U.S.] military command structure) power”¹⁶⁶ to deploy U.S. forces, assign missions, organize and equip units, promote military personnel, and administer discipline, but can still place appropriate forces under the temporary control of foreign commanders for specific operations (e.g., U.N. peace operations).¹⁶⁷

Once again, however, by the terms of the SAC MOU, the Consortium’s C-17s are to be operated as military aircraft of the flag nation, the Republic of Hungary, and, as the flag nation, Hungary is further affirmatively obliged to assume international responsibility for the aircraft and enforce all state aircraft privileges and immunities vis-à-vis third countries.¹⁶⁸ It must be emphasized that “[e]ach aircraft can have only one nationality [and] . . . [s]tate aircraft, including military aircraft, have the nationality of the State [that] owns and uses them in public service, in accordance with recognized principles of customary international law applicable to warships.”¹⁶⁹ Hence, the mantle of Hungarian sovereign authority, which by virtue of the status of military aircraft as sovereign instrumentalities is embroidered with the title “aircraft commander,” effectively attaches to U.S. military pilots when commanding HAW missions.¹⁷⁰ While this authority is in place only for a specific time or mission in the same manner as operational control,¹⁷¹ because it flows directly from the Republic of Hungary to the aircraft commander as a manifestation of the exclusivity of flag-nation jurisdiction aboard the aircraft, it falls outside the HAW command and con-

¹⁶⁶ J. William Snyder, Jr., “Command” versus “Operational Control”: A Critical Review of PDD-25, (1995), <http://www.ibiblio.org/jwsnyder/wisdom/pdd25.html>.

¹⁶⁷ Exec. Summary, *supra* note 13, at 807–08.

¹⁶⁸ SAC MOU, *supra* note 11, §§ 14.1, 14.3, 14.5.

¹⁶⁹ Fedele, *supra* note 149.

¹⁷⁰ See *id.* at 14 n.34.

The Chicago Convention assumes that aircraft are legal entities and directly recognizes the States as the guarantor of the conduct of the aircraft possessing its nationality as well as the protector of such aircraft. At the time of the Chicago Convention, customary international air law had so completely accepted the concept of nationality of aircraft that there was no question respecting the nationality of State aircraft.

See also John C. Cooper, *National Status of Aircraft*, 17 J. AIR L. & COM. 292, 307 (1950). *A fortiori* similar rights and responsibilities flow from the state to its state aircraft. Cf. MALCOLM N. SHAW, *INTERNATIONAL LAW* 494–95 (5th ed. 2003) (discussing the status of a warship as “a direct arm of the sovereign of the flag state”); see also *supra* notes 98–100 and accompanying text.

¹⁷¹ See Exec. Summary, *supra* note 13, at 808 (defining operational control).

trol framework agreed to in the MOU.¹⁷² Moreover, though a U.S. pilot serving as aircraft commander aboard a SAC C-17 aircraft receives no remuneration from the Hungarian government,¹⁷³ the position of aircraft commander on a military aircraft in and of itself “‘contain[s] elements comparable to accepting an office from a foreign government,’ including ‘duties and responsibilities’ . . . comparable to that owed by an officer or employee of a government.”¹⁷⁴ Therefore, to the extent that the duties and responsibilities that the pilot owes to Hungary in his capacity as aircraft commander—such as, for example, the duty to ensure observance of flag-nation (i.e., Hungarian) law on board the aircraft¹⁷⁵—could conflict with his role as an officer of the United States, the arrangement may beget the type of divided loyalty forbidden by the Emoluments Clause.¹⁷⁶

V. A POSSIBLE ALTERNATIVE CONSTRUCT

For states that adhere to a restrictive definition of state/military aircraft, as does the United States, for example, the legal status of the SAC C-17 aircraft as state/military is, for the most part, self-evident, based primarily on the fact that the aircraft bear military markings and are commanded over and operated by armed forces members, etc.¹⁷⁷ But again, since neither the SAC nor the HAW has a legal personality unto itself and by operation of the SAC MOU the Consortium’s C-17s function as Hungarian state/military aircraft, the question of whether and under what circumstances these aircraft may be classified as civil must take into account currently prevailing laws and policies of the Republic of Hungary, as the flag nation.¹⁷⁸ Thus, to the extent

¹⁷² Compare SAC MOU, *supra* note 11, § 16 (HAW command and control), with §§ 14.7.1, 14.8.1 (flag-nation delegations of authority with respect to foreign officials and transport of armed military personnel aboard SAC C-17 aircraft).

¹⁷³ See SAC MOU, *supra* note 11, §§ 15.5.1, 21.3.

¹⁷⁴ Memorandum opinion from Daniel Koffsky, Acting Assistant Attorney Gen., Office of Legal Counsel, U.S. Dep’t of Justice, to John E. Huerta, Gen. Counsel, Smithsonian Institution (May 24, 2001), available at <http://www.justice.gov/olc/smithsonianwb.htm> [hereinafter DOJ Emoluments Clause Memo]; see also *supra* notes 98–100 and accompanying text.

¹⁷⁵ Even to the possible exclusion of contrary U.S. law.

¹⁷⁶ DOJ Emoluments Clause Memo, *supra* note 174. But see Memorandum from J. Lee Rankin, Assistant Attorney Gen., Office of Legal Counsel, U.S. Dep’t of Justice, to S. A. Andretta, Admin. Assistant Attorney Gen. 8 (Oct. 4, 1954) (“[T]he term ‘emolument’ . . . was intended to cover *compensation* of any sort arising out of an *employment relationship* with a foreign state.” (emphasis added)).

¹⁷⁷ See *supra* notes 50–53 and accompanying text.

¹⁷⁸ See *supra* notes 155–57 and accompanying text.

there is uncertainty relating to the legal status of the SAC aircraft and, therefore, with respect to the associated authorities of the aircraft commanders as well, it is chiefly attributable to the absence of any national or international legal personality on the part of either the SAC or the HAW and the corresponding lack of a transparent basis or touchstone upon which to conclusively establish the status of the aircraft as state/military.

One way whereby the status of the SAC aircraft as state/military could be solidified and rendered more transparent would be to bring the HAW under the NATO umbrella, à la NATO's NAEW&CF E-3A Component, so that the HAW could similarly participate in the international legal personality of NATO.¹⁷⁹ And, though the participation of non-NATO member states Finland and Sweden in the Consortium would certainly portend this to be more easily said than done, there is another NATO-multinational military partnership whose structure could well be adopted to accomplish this end. Specifically, SAC participants could look to the arrangement in place between NATO and the Eurocorps as a model for a new NATO-HAW framework.

The Eurocorps is a by-product of the Franco-German Treaty signed in Paris in 1963, commonly known as the Treaty of Elysée, wherein the parties committed to collaboration in the field of defense as a means of enhancing post-war reconciliation between the two countries, which, in turn, led to the creation of the Franco-German Brigade in 1989.¹⁸⁰ In 1992, this unit, comprising French and German elements, was opened for participation from other member states of the Western European Union (WEU)—then the defense arm of the EU—and was redubbed the Eurocorps.¹⁸¹ The Eurocorps officially stood-up on October 1, 1993, when Lieutenant General Helmut Willmann of Germany became its first Commanding General.¹⁸² At its inception, the Eurocorps had just three members (Germany, France, and Belgium); however, it has since expanded to five states with the

¹⁷⁹ See *supra* note 26.

¹⁸⁰ Eurocorps, *Eurocorps' History* 1 (Jan. 9, 2005), available at http://www.europarl.europa.eu/meetdocs/2004_2009/documents/dv/eurocorps_history_/eurocorps_history_en.pdf [hereinafter *Eurocorps' History*].

¹⁸¹ *Id.*; see also generally Eurocorps, *History of HQ Eurocorps* 1, http://www.eurocorps.net/pdf/eng/History_of_the_Eurocorps.pdf [hereinafter *History of HQ Eurocorps*].

¹⁸² *History of HQ Eurocorps*, *supra* note 181, at 2; see also *Eurocorps' History*, *supra* note 180, at 2; see also DIETER FLECK & STUART ADDY, ET AL., *THE HANDBOOK OF THE LAW OF VISITING FORCES* 34 (Dieter Fleck et al. eds., 2001) (noting that the Eurocorps did not achieve "operational readiness" until November 30, 1995).

additions of Spain and Luxembourg, as the multinational unit has evolved into a crisis response force under the permanent command of the European Union.¹⁸³ Simultaneously, the Eurocorps' relationship with NATO has also significantly evolved.

The Eurocorps' association with NATO was initially defined in a formal agreement signed on January 21, 1993, between French Chief of Staff Admiral Jacques Lanxade, his German counterpart, General Klaus Naumann, and the NATO Supreme Allied Commander Europe (SACEUR) General John Shalikashvili, which is commonly referred to as the SACEUR Agreement. The SACEUR Agreement spelled out conditions for employment of the Eurocorps in support of NATO with a view toward collective self-defense missions arising under article 5 of the Washington (NATO) Treaty,¹⁸⁴ but did not contemplate the Eurocorps involvement in "out-of-area activities."¹⁸⁵ In the decade that followed, however, the Eurocorps transformed to become one of six NATO Rapid Deployable Corps—i.e., a "[h]igh [r]eadiness [h]eadquarters" that can be deployed at short notice to lead NATO forces on missions wherever they are needed, "within or beyond the territory of NATO member states."¹⁸⁶ Plus, upon receiving NATO certification as a Rapid Deployable Corps in 2002, the Eurocorps was opened to *all* NATO member nations, and several NATO members actually integrated personnel into its headquarters staff.¹⁸⁷ More recently, Poland has entered into the process to becoming the sixth "framework (full member)

¹⁸³ *History of HQ Eurocorps*, *supra* note 181, at 2–3; see European Parliament Resolution of 5 June 2008 on the Implementation of the European Security Strategy and ESDP (2008/2003(INI)), 2009 O.J. (C 285E) 23.

¹⁸⁴ North Atlantic Treaty art. 5, Apr. 4, 1949, 63 Stat. 2241, 2244, 34 U.N.T.S. 243, 246.

¹⁸⁵ ANAND MENON, FRANCE, NATO, AND THE LIMITS OF INDEPENDENCE, 1981-97: THE POLITICS OF AMBIVALENCE 44 (2000).

¹⁸⁶ NORTH ATLANTIC TREATY ORGANIZATION, *The Rapid Deployable Corps: Commanding NATO Troops on Missions Wherever Necessary*, http://www.nato.int/cps/en/natolive/topics_50088.htm (last visited Sept. 1, 2011) [hereinafter *Rapid Deployable Corps*] (on file with author); see also *History of HQ Eurocorps*, *supra* note 181, at 3 (noting that "[i]n 2002, NATO evaluated the [Eurocorps'] general capabilities and its operational capability in several steps" and certified the Eurocorps as a "Rapid Reaction Force HQ").

¹⁸⁷ In 2002–03, personnel from NATO member nations Canada, Greece, Poland, and Turkey joined the Eurocorps' staff; liaison officers from Italy, the Netherlands, and the United Kingdom were also detailed to the headquarters. *Eurocorps' History*, *supra* note 180, at 3; *History of HQ Eurocorps*, *supra* note 181, at 3.

nation,” and the United States, Italy, and Romania have all submitted applications for incorporation.¹⁸⁸

Yet, during this same period, the Eurocorps witnessed increased participation from non-NATO EU-member states as well, with the addition to the headquarters staff of officers from Austria and Finland.¹⁸⁹ Furthermore, the Eurocorps remains at the disposal of the EU for crisis response operations and, by virtue of the 2009 Treaty of Strasbourg,¹⁹⁰ also maintains its own legal personality and, with it, operational autonomy to include command responsibility and authority over “[issuing bids for and procuring] materials and personnel, as well as environmental, workforce[,] and many other operational issues.”¹⁹¹ Moreover, its status as a NATO headquarters notwithstanding, the Eurocorps remains outside NATO’s integrated military structure and “any commitment of the Eurocorps requires an exclusive decision of the member states, Belgium, France, Germany, Luxembourg[,] and Spain.”¹⁹²

Were the SAC to adopt the Eurocorps model, the HAW too could become a NATO headquarters and thereby share in the alliance’s international legal personality,¹⁹³ which would address the legal ambiguities surrounding the authority and responsibil-

¹⁸⁸ Press Release, Eurocorps, The Treaty of Strasbourg Confirms Eurocorps as a Pioneer in European Defence 1 (Feb. 25, 2009), *available at* http://www.eurocorps.org/news.php?id_news=787 [hereinafter Press Release (Treaty of Strasbourg)].

¹⁸⁹ *Eurocorps’ History*, *supra* note 180, at 3; *see also History of HQ Eurocorps*, *supra* note 181, at 3.

¹⁹⁰ On February 26, 2009, the Treaty of Strasbourg entered into force after the parliaments of the Eurocorps “Framework Nations” (Belgium, France, Germany, Luxembourg, and Spain) ratified the text of the agreement that had been signed by their respective ministers of defense in Brussels on November 22, 2004, which designated the Eurocorps as a rapid reaction force placed at the disposal of the EU for purposes of carrying out the missions set forth in the Petersberg Declaration (named for the Hotel Petersberg near Bonn, Germany, where the meeting took place). *See* Press Release (Treaty of Strasbourg), *supra* note 188, at 1. The so-called Petersberg missions include: “humanitarian and rescue tasks; peacekeeping tasks; [and] tasks of combat forces in crisis management.” Petersberg Declaration, Western European Union Council of Ministers 6, Jun. 19, 1992, *available at* <http://www.wcu.int/documents/920619peten.pdf>.

¹⁹¹ Press Release (Treaty of Strasbourg), *supra* note 188, at 1.

¹⁹² *Rapid Deployable Corps*, *supra* note 186.

¹⁹³ *See* SHERROD L. BUMGARDNER ET AL., NATO LEGAL DESKBOOK 106–07 (Zoltán Hegedüs et al. eds., 2d ed. 2010) (Entities established by NATO nations outside the NATO command structure (such as “MOU-organizations”) may be granted international status under the Protocol on the Status of International Military Headquarters Set Up Pursuant to the North Atlantic Treaty, Aug. 28, 1952, 5 U.S.T. 870, T.I.A.S. No. 2978, 200 U.N.T.S. 340, *reprinted in* 48 AM. J. INT’L

ities of SAC C-17 aircraft commanders in two significant ways. First, the matter of the legal status of the SAC C-17 aircraft would be simplified, as HAW operations would ostensibly be subsumed into, and take on the military character of, NATO's collective defense function. The aircraft would therefore be more clearly categorized as military—and the officers in command would hence exercise military aircraft commander authority—regardless of the nature of any particular mission or its beneficiary. Second, attaching NATO's legal personality to the HAW would also likely resolve the question of whether placing U.S. military pilots in command of Hungarian flagged SAC aircraft violates the Emoluments Clause of the U.S. Constitution in favor of the pilots being able to lawfully perform this function. The U.S. Department of Justice (DoJ) has recognized that “[a]n international organization in which the United States participates . . . is not a ‘foreign State’ under the Emoluments Clause.”¹⁹⁴ In arriving at this conclusion, the DoJ opined that when “the United States has determined that [an] organization plays an important role in carrying out [U.S.] foreign policy” and so, “participates in the governance of the organization and undertakes a leadership role in its decisionmaking,” participation of U.S. officers or employees in the organization “[does] *not* directly raise the concerns about divided loyalty that the Emoluments Clause was designed to address.”¹⁹⁵ Thus, if HAW operations were conducted under the NATO umbrella, any Emoluments Clause concerns would arguably be eliminated, since U.S. military pilots would not be directly in command of a foreign military aircraft per se, but would instead be fulfilling the U.S. role in NATO “as approved by Congress.”¹⁹⁶

At the same time, adoption of the Eurocorps model would serve the interest of the SAC Consortium and, particularly, the non-NATO participants, in preserving the HAW's operational autonomy, just as it does for framework nations and participating non-NATO EU countries with the Eurocorps. Under this alternative type of arrangement, “entities that are established by NATO nations outside NATO command structure [such as ‘MOU-organizations’] . . . remain under control and are

L. 163 (1954) [hereinafter Paris Protocol], and “are considered to form part of NATO command activities without being included in the command structure.”).

¹⁹⁴ DOJ Emoluments Clause Memo, *supra* note 174, at 1.

¹⁹⁵ *Id.* at 2.

¹⁹⁶ *Id.*; but see sources cited *supra* note 149.

resourced by the Nations establishing them.”¹⁹⁷ Additionally, the SAC MOU currently allows only Hungary, as the flag nation, to veto use of the SAC C-17 aircraft in cases where it deems the mission inconsistent with its international legal obligations,¹⁹⁸ while an “opt out” provision affords the remaining SAC participants the ability to simply eschew participation in, as well as pecuniary liability (and, presumably, international responsibility) for, HAW missions they object to on national security or vital foreign policy grounds.¹⁹⁹ Following the Eurocorps model, however, employment of the HAW under NATO command could instead be conditioned upon the approval of *all* Consortium members.²⁰⁰ This would ensure each SAC member, including non-NATO nations, the ability to uphold its sovereign interests and safeguard its material and monetary contributions to the Consortium, while the “opt out” option could conceivably remain in place to provide individual participants an efficient means to abstain from involvement in specific operations when comparably less vital national interests are at stake.

VI. CONCLUSION

With the projected rise in global demand for strategic airlift, many nations’ future requirements for airlift will undoubtedly exceed their individual capabilities. At the same time, in an era of competing domestic priorities and tight budgets, nations are promoting multinational projects for sharing or pooling of military assets and other joint military procurements as a way to stretch their increasingly shrinking defense budgets. Availability and cost effectiveness are therefore likely to drive future expansion and/or propagation of multinational projects for cooperative and/or shared use of “air mobility” assets, like the SAC Consortium. So, while the SAC partnership and the question of the legal status of its C-17 aircraft might at first be seen as a *sui generis* case, issues related to the legal status of shared military

¹⁹⁷ See BUMGARDNER, *supra* note 193, at 106.

¹⁹⁸ SAC MOU, *supra* note 11, § 17.8.

¹⁹⁹ SAC MOU, *supra* note 11, § 17.10. This provision states that:
Any Participant may for national security or vital foreign policy reasons, opt out from a mission by notifying the HAW/CC, and inform the Participants through the SAC SB prior to mission execution. No personnel, including crewmembers, or cargo of the Participant opting out will be onboard the C-17 aircraft during the execution of such mission. The Participant opting out will not be associated with any liability and claims paid as a result of that mission.

²⁰⁰ See *supra* note 192 and accompanying text.

aircraft and their implications for crew members and, especially, the aircraft commander can be expected to take on increasing importance to both the policymakers and the legal practitioners behind these arrangements. The main purposes of this article were to define the status and authority of the military aircraft commander under international law and to show how the SAC Consortium's organizational structure casts a shadow of doubt on the certainty of the legal status of its aircraft and, hence, on the status and authority of the military officers commanding over the aircraft as well. It is hoped that this study will not only positively contribute to the debate over the need to update the existing air law regime and to seek resolution of lingering ambiguities like those surrounding the definition of state aircraft, but will also encourage further research on the subject.